Supreme Court of the United States

OCTOBER TERM, 1966.

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No. 898

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM,
MALCOLM B. MONTGOMERY,
315-21 Barnett Building,
Jackson, Mississippi.

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W. H. YATES, and JOHN W. GARY,
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versus

HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi, entered in the above entitled cause on July 8, 1966, and to review the judgment of said Court overruling the Suggestion of Error entered in the above entitled cause on September 27, 1966.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion rendered by the Chancery Court of the First Judicial District of Hinds County, Mississippi (R-506) is unreported but is print-

ed in Appendix B hereto at Page 19. The Opinions of the Supreme Court of Mississippi (R-532-566) are reported in *189 So. 2d 113*, but for the convenience of the Court are printed in Appendix B hereto at Pages 25 and 53. The Suggestion of Error is printed in Appendix B hereto at Page 64.

No opinion was delivered on the overruling of the Suggestion of Error (R-571) but a copy of the judgment overruling same is printed in Appendix B at Page 69.

JURISDICTIONAL STATEMENT.

The judgment or decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi (R-513) was entered on July 8, 1965 and is printed in Appendix B hereto at Page 23. The unexpected judgment or decree of the Supreme Court of Mississippi was entered on July 8, 1966 (R-567) and is printed in Appendix B hereto at Page 62. The Suggestion of Error, raising the Federal Constitutional questions (R-568) was timely filed in the Supreme Court of Mississippi, on the 16th day of August, 1966, and is printed in Appendix B hereto at Page 64. The title, right, privilege or immunity under federal law was distinctly asserted defensively and the Order of the Supreme Court of Mississippi, overruling the Suggestion of Error was rendered on the 27th day of September, 1966, is printed in Appendix B hereto at Page 68. and is not based, in the alternative or otherwise, on an adequate and independent non federal ground. Review by this Court is sought to correct it to the ex-

tent that it incorrectly adjudged federal rights under the due process clause of the Fourteenth Amendment, and the power of this Court to correct this wrong judgment is hereby invoked under the provisions of 28 U. S., Section 1257(3) where Petitioners claim the denial to them of due process under the due process clause of the Fourteenth Amendment. Review by this Court is sought in order that Petitioners may be, by this Court, protected from a void judgment, rendered on a charge not made in the complaint, not raised as an issue by the pleadings, upon which the Petitioners were not summoned to defend against, did not litigate it, and could not litigate it, because proof in defense against it would have been irrelevant to any issue raised by the pleadings and incompetent and proof could not prevail in the absence of an allegation in the complaint specifically charging the ground as a cause of action on which plaintiffs sought recovery. Petitioners feel that the action of the Supreme Court of Mississippi, in rendering a judgment against them for $10,400.00 on a ground upon which they were not sued, a ground which was not raised by the pleadings, is a violation of the due process clause guaranteed to them by the Fourteenth Amendment and that their right thereasto has been infringed by the decree of the Supreme Court of the State of Mississippi. *Live Oak Ass'n. vs. Railroad Commission, 269 U. S. 354; Virginia vs. Imperial Coal Sales Co., 293 U. S. 15; Motlow vs. State ex rel Koeln, 295 U. S. 97; Dupasseur vs. Rochereau, 21 Wall 130.* Section 1257 (3) covers the entire range of federal questions that can arise in a law suit in a State Court

and the question here is urged as within the certiorari jurisdiction of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Is the judgment that was rendered against Petitioners by the Supreme Court of Mississippi a final judgment?

2. Did the Supreme Court of Mississippi, have jurisdiction to determine an issue not raised by the pleadings between the Complainants and petitioner Defendants thereon?

3. Did the determination by the Supreme Court of Mississippi of an issue not raised by the pleadings between Complainants and petitioning defendants, but was raised only between Complainants and a co-defendant, which issue the petitioning defendants were not summoned to defend and did not litigate, and on which the Supreme Court of Mississippi entered a final judgment against petitioning Defendants—did such judgment constitute a denial of the rights guaranteed by the due process clause of the Fourteenth Amendment?

4. Did the denial to petitioning Defendants of such due process by the Supreme Court of Mississippi, constitute a title, right or immunity within the meaning of Title 28 U. S. C., Section 1257 (3) providing that final judgments or decrees rendered by the highest Court of a State, in which a decision may be had, may be in such cases reviewed by the Supreme Court of the United States?

STATUTES AND REGULATIONS INVOLVED.

The Statutory provisions involved are Section 1284, Mississippi Code of 1942 (Recompiled) which is printed in the Appendix A hereto at Page 17; 28 U. S., Section 1257 (3) which is printed in the Appendix A hereto at Page 17; Amendment XIV, Section 1 of the Constitution of the United States that is printed in Appendix A hereto at Page 18.

STATEMENT OF FACTS.

This litigation concerns a final judgment entered by the Supreme Court of Mississippi, against Petitioners herein on an issue not raised by the pleadings between them and Complainants but raised by Petitioners' co defendant, State Stove Manufacturing Company, as an affirmative defense between it and Complainants. The decision awarding this judgment and overruling the Suggestion of Error therein is probably not in accord with decisions of this Court.

Yates and Gary, Petitioners, as contractors, contracted to erect a home for Complainants, according to the plans and specifications thereof and to deliver a lock and key job for a stipulated amount.

They purchased and installed a hot water heater, manufactured by State Stove Manufacturing Company. In doing so they installed a pressure relief valve in the cold water line of the heater, as required by the manufacturers' directions accompanying the

pressure relief valve and in a manner approved by the applicable building Safety Codes.

The tee was placed in the cold water line to the heater at a point just above where said cold water line entered the heater. Attached to this valve was a waste pipe and inside the valve was a spring, the tension of which could be set at a desired pressure, always less than that required to produce steam and when that pressure is reached the spring will contract and permit hot water from the tank to escape through the waste pipe and be replaced by cold water from the cold water supply line, and if the pressure in the tank exceeds the water pressure in the cold water line, the water will flow back into the supply water main and relieve the tank pressure.

A plastic dip tube is attached to the cold water line where it enters the tank and this tube conducts the cold water to the bottom of the tank where it is discharged, providing circulation of the water in the tank and maintaining a uniform temperature of the water in the tank.

Some six months after the home had been completed and occupied by the Complainants and during their absence from home the hot water heater exploded, destroying the house and much of the household effects.

Hodges and wife then filed an attachment suit in the Chancery Court of the First Judicial District of Hinds County, Mississippi, against State Stove Man-

ufacturing Company and against Yates and Gary, your Petitioners herein, and certain garnishees as co-defendants.

The Complainants charged that Yates and Gary negligently installed the pressure relief valve on the cold water line, when they knew or should have known that it would likely cause the heater to explode unless installed on the hot water side of the heater and the negligent installation on the cold water side was the proximate cause of the explosion.

As against the co-defendants, State Stove Manufacturing Company, the complaint charged that the water heater was unsafe and was negligently manufactured in an unsafe condition.

Yates and Gary denied that the placing of the valve on the cold water side of the heater was improper, denied that it was not a safe installation, and denied that such installation was the proximate cause of the injury.

State Stove Manufacturing Company denied that the heater was unsafe and affirmatively pleaded that accompanying the heater were directions for its installation that required the installation of a combination pressure relief and temperature valve in the hot water line and provided that failure to install such combination valve would void its warranty of the heater. Issue was made up thereon between Complainants and the Defendant, State Stove Manufacturing Company, by the pleadings between them but

the issue raised by the pleadings between the Complainants and the petitioning contractors remained solely on the cause of action for negligence in placing the pressure relief valve on the cold water side of the heater and nothing more.

Petitioning contractors were not summoned to defend against any other unplead cause of action, did not litigate any other cause of action and confined their proof to the issue so raised against them. Having proven by a preponderance of the evidence that the installation of the pressure relief valve on the cold water side of the heater met all the safety requirements of the applicable safety codes and of the common practices in the trade, the trial Court dismissed the complaint as to them and discharged them from all liability.

The Trial Court found, however, that State Stove Manufacturing Company was negligent in using a plastic tube that melted and closed the exit of hot water from the tank through the waste pipe and that safe construction required the use of a copper or metal dip tube that would not melt and gave judgment against State Stove Manufacturing Company for the damages resulting from the explosion.

State Stove Manufacturing Company appealed to the Supreme Court of Mississippi, and the Complainants took a cross appeal claiming the damages allowed to be inadequate and also took a direct appeal from the judgment dismissing the suit as to the petitioning contractors.

The Supreme Court of Mississippi, became confused as to what were the issues raised by the pleadings between the Complainants and petitioning contractors and the issues between Complainants and the co-defendant, State Stove Manufacturing Company, and held the petitioning contractors liable and entered final judgment against them for the sum of $10,400.00 on the issue that was raised only between Complainants and State Stove Manufacturing Company and not an issue raised by the pleadings between Complainants and petitioning contractors and held the contractors liable under the affirmative defense of State Stove Manufacturing Company that the explosion proximately resulted from the failure of the contractors to install a combination relief and temperature relief valve on the hot water side of the heater, when no such issue had been raised by the pleadings between Complainants and the petitioning defendant contractors. On the contrary the sole issue and the sole cause of action pleaded by Complainants against petitioners was that the proximate cause of the explosion was in not placing the pressure relief valve on the hot water side of the heater. This being the only cause of action charged in the complaint, it became and was the only cause of action the petitioning contractor defendants were summoned to defend against. It became the only issue raised by the pleadings and no evidence could be competent unless relevant to that issue. The petitioning contractor defendants were not called upon to litigate any other issue and did not do so.

When the Supreme Court of Mississippi entered judgment against petitioning contractors upon an issue not raised by the pleading between them and Complainants and upon which the Petitioners had not had their day in Court to be heard in defense of it, they timely filed a Suggestion of Error in the Supreme Court of Mississippi, raising the constitutional question of the deprivation of due process guaranteed by the Fourteenth Amendment but same was overruled by the Supreme Court of Mississippi, without rendering an opinion.

REASONS FOR GRANTING THE WRIT.

The decision of the Supreme Court of Mississippi, is in conflict with its own former decision in *Mississippi Power & Light Co. vs. Pitts, 179 So. 364,-365,* wherein the Court held:

> "The whole matter may be summed up in the statement that it is the pleadings and the developed facts within the pleadings that Courts are obliged to follow and to which the parties and Counsel must be held; not arguments."

The decision was also contrary to the Court's previous holding in *Wilson vs. Terry, 67 So. 2d 387,* wherein the Court held that a defendant is:

> "Bound to take notice only of the allegations, if any, against him in the original or amended declarations."

The decision of the Supreme Court of Mississippi is also in direct conflict with its former decision in *Rutland et al. vs. McIntosh, 121 Miss. 437, 83 So. 635,* holding that relief cannot be granted under a prayer for general relief when not supported by a specific allegation in the bill.

The decision by the Supreme Court of Mississippi, is also contrary to the decision of this, the highest Court of the land, in *Reynolds vs. Stockton (1891), 140 U. S., pp. 254, 266,* wherein it was held that:—

> "The rule is universal that where it appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as to determine matters which by the pleadings are put in issue."

The decision by the Supreme Court of Mississippi, in the instant case, is in direct conflict with the decision by the Court of Appeals (10th Cir.) in *Osage Oil & Refining Co. vs. Continental Oil Co., et al., 34 Fed. 2d 585, 588,* wherein it was held:—

> "Issues not raised by the pleadings cannot be determined."

The decision by the Supreme Court of Mississippi, awarding judgment on an issue not raised by the pleadings between Complainants and the Defendants against whom the judgment was rendered is in direct conflict with the decision rendered by the Court of Appeals (10th Cir.) in *United States vs. Goldstein, et al., 271 Fed. 838,* wherein it was held:—

"A judgment upon a matter not within the pleadings and not litigated is void, being contrary to fundamental principles of justice. Reynolds vs. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; Coe vs. Armour Fertilizer Works, 237 U. S. 413, 426; 35 Sup. Ct. 625, 59 L. Ed. 1027. A decree has to be founded on the allegata as well as the probata of the case. Putnam vs. Day, 89 U. S. (22 Wall) 60, 66 (22 L. Ed. 764; Hendrys vs. Perkins, 114 Fed. 801, 806, 52 CCA 435."

The decision rendered by the Supreme Court of Mississippi, and the judgment thereon beyond the issues raised by the pleadings is directly contrary to the decision of this High Court in *Coe vs. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. Rep. 625, 630,* where it was held:—

"In doing this, the Court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to the fundamental principles of justice."

The decision by the Supreme Court of Mississippi, and the judgment entered by it thereon is in direct conflict with the holding of the Court of Appeals (10th Cir.) in *Beach, Inc. vs. Koch, et al., 140 F. 2d 852, 861,* wherein it was held:—

"A party is no more entitled to recover upon a claim not pleaded than he is entitled to recover upon a claim pleaded but not proven."

The judgment rendered by the Supreme Court of Mississippi is a final judgment. The Supreme Court in its opinion said:—

> "As to the appeal of Mr. and Mrs. Hodges from the decree dismissing Yates and Gary, the decree is reversed and judgment rendered here adjudicating liability of Yates and Gary of damages to the house of $10,400.00, and as to them the cause is reversed and remanded for the limited purpose only of determining the quantum of such personal property damages." (R-532.)

From this language it is clear that definite disposition has been made by the Mississippi Supreme Court of all legal and factual issues in the case, so far as relates to the $10,400.00 judgment. No loose ends remain to be tied up. Liability has been determined finally and the amount of damages has been finally and irrevocably adjudicated. *Republic Natural Gas Co. vs. Oklahoma, 334 U. S. 62, 68; Bruce vs. Tobin, 245 U. S. 18; Mississippi Central R. R. Co. vs. Smith, 295 U. S. 718.* The judgment leaves nothing to be done. It is final.

The Supreme Court of Mississippi, has rendered judgment against these petitioners for $10,400.00 on an issue that was not within the pleadings, on an alleged cause of action that was not charged against them in the complaint and which judgment is void. *United States vs. Goldstein, 271 Fed. 838.* They are taking $10,400.00 from petitioners on an assumed cause of action that petitioners were not summoned

to answer or defend against. This was a violation of due process within the meaning of the Fourteenth Amendment and, though the question of due process, was not raised until the said Supreme Court had acted without it, yet there was no cause or justification for raising it until the Supreme Court of Mississippi made it necessary and appropriate that it be raised. The question was timely raised in the Supreme Court of Mississippi by Suggestion of Error which the Court overruled. Under such circumstances the Supreme Court of the United States has jurisdiction to review the judgment. *Grannis vs. Ordean, 234 U. S. 385; Saunders vs. Shaw, 244 U. S. 317.*

For this Court to be authorized to take jurisdiction and review this decision by certiorari, it seems that it is enough that the right, privilege or immunity under federal law be asserted defensively and that, as here, the State Court's decision passes upon the federal question and on no non federal ground and federal rights have been infringed by this State Court's decision. *Live Oak Assn. vs. Railroad Commission, 269 U. S. 354; Virginia vs. Imperial Coal Sales Co., 293 U. S. 15.*

It seems, therefore, that this decision, by the Supreme Court of Mississippi, is a final judgment, based solely on a federal ground and incorrectly decides those federal rights and this Court has power to correct this wrong judgment under the provisions of *28 U. S., Section 1257 (3).*

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM,

By MALCOLM B. MONTGOMERY,
315-21 Barnett Building,
Jackson, Mississippi.

CERTIFICATE OF SERVICE.

I, Malcolm B. Montgomery, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the date shown below, I served the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi, on Herbert H. Hodges and Frances A. Hodges, his wife, Respondents, by mailing a true copy thereof to Honorable W. H. Jolly, P. O. Box 743, Columbus, Mississippi, and to Honorable Dewitt T. Hicks, Jr., Threadgill and Hicks, P. O. Box 1094, Columbus, Mississippi, air mail, postage prepaid, by first class mail, Attorneys of record for said Respondents.

Dated this, the 21st day of December, 1966.

Malcolm B. Montgomery,
Attorney for Petitioners,
P. O. Box 1288,
Jackson, Mississippi.

APPENDIX A.

Section 1284, Mississippi Code of 1942.

§ 1284—**WHAT BILL MUST CONTAIN.**

The bill must contain a statement of the facts on which the complainant seeks relief, in ordinary and concise language, without repetition or needless prolicity, and conclude with a prayer for relief, without a charge of combination or confederacy by the defendants, or the insufficiency of the remedy at law, or other merely formal matter or similar useless averment, but the bill may contain special interrogatories to the defendant; but it shall not be a ground of objection to a bill that it contains all the parts of a bill according to the former practice in chancery pleadings.

* * * * * * * *

28 U. S., Section 1257(3).

§ 1257 STATE COURTS: APPEAL: CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or im-

munity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

* * * * * * * *

Amendment XIV, Section 1 to United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B.

Memorandum Opinion of Chancery Court:

This appears to be a case of first impression in Mississippi, and we have had hot water tanks in Mississippi, both gas and electric, for many, many years, many of both, and only recently have we been reading about explosions over the country. I assume that that accounts for us not having any record case in Mississippi or any of the neighboring states. I don't recall any.

I want to thank the attorneys on both sides for their presentation and defense of this case. You have been very courteous to the Court, you have been very courteous to each other and to the witnesses, and that's something that every judge appreciates very much.

Now, the complainant predicates his liability against the contractors, Mr. Yates and Mr. Gary, on the theory that the pressure valve was placed in the cold water line instead of the hot water line, but a preponderance of the evidence demonstrates that hundreds upon hundreds of electric tanks have been installed in the same way and no trouble has ever arisen by way of explosion along with valves so installed until this heater exploded, and I don't believe this water heater would have exploded, and so find, if the plastic tube hadn't fused and disintegrated to a point where cold water could not get into the water tank, and had it not stopped up the valves and pipes.

You can cut into the valves and pipe with your knife, and it's plain that that's plastic.

I don't find any casual cause of the explosion in the way that the contractors installed the water heater, so I find for them in this case.

Now, I have looked inside of the tank that blew up, and that was some explosion. It blew out through the roof, tearing the roof out, and going about 200 feet over into a lot. It must have been a tremendous explosion, and did considerable damage to the house and the furniture of the complainant. That in itself to me demonstrates that this particular water heater was a dangerous appliance, and it is further demonstrated to me that it was a dangerous appliance because it is common knowledge that plastic will fuse and disintegrate with the proper amount of heat, and the only safeguard that the manufacturer took against excessive heat was the thermostats, which are mechanical, and it is common knowledge that anything mechanical with moving parts will fail to work from time to time, and the company knowing what might happen to that plastic tube should have added some safeguard against the thermostats not working in order to prevent the plastic dip tube from fusing and disintegrating, but they didn't.

I hold that that was negligence in the manufacturer of this hot water tank.

Now, this dip tube could not be ascertained by an inspection, nor could the thermostats be checked by a

user to any degree of accuracy. It would take an expert to do that. And the danger in this particular water tank was latent and not patent, and being a dangerous instrumentality, I hold the doctrine of *res ipsa loquitur* applies as a matter of law, and that the stove company is liable.

Now, as to the damages, I believe they asked for about $10,000.00 for personal property, is that correct? But if he had $10,000.00 worth of personal property in that house, he's got more than I've got, and they say I have a very nicely furnished home.

Now, he fixes his value on that according to what he paid for it from time to time, some of it dating back 8 years, and that's all he does. There's no rule or guide there for me to ascertain the damages to the personal property known to law. The cost is a factor in ascertaining damages, connected with other things, but it's not conclusive or even *prima facie*, by any means, but, although he's not entitled to actual damages, he's entitled to nominal damages, and when the degree is prepared I want it spelled out as nominal damages to the personal property.

Now, this house wasn't but seven months old. It hadn't depreciated too much. Mr. Yates, I asked him about that myself. He said it was negligible, or words to that effect. And there's nothing in the record to show that it had enhanced in value.

Now, I'll say that the place with the lot might be worth $1350.00, but the house by itself would not be,

because that's not taking into consideration the value of the lot.

I think that at the time of the destruction under Mr. Yates' testimony and under the pictures that I saw and the construction that I observed and what is commonly known about houses, its location, that at the time it was destroyed it was worth the $1150.00—$11,500.00, but now we have got the salvaged involved, and I may be in error about the salvage. I don't think I am. I saw what was there and I know what was left from the pictures. I'll say the net salvage was worth $500.00 net, and then I'll fix the value of the heater and air conditioner—I believe it was a combination—after the fire. I think before the fire it was just about new, worth $1400.00, but I think after the fire $600.00 would be a fair value for it. That would be $1100.00 to come off of $11,500.00. That would be a total judgment on the house for $10,400.00, or a total judgment of $10,900.00.

Now, this is a case I'm not sure about at all. I have no pride of opinion in it. I could be just as wrong as I could be, but I believe I am doing what's right, whether I'm wrong in the law or not, and when the law ceases to be right we need to change the law, but that's not my function. I think I'm following the law in a case like this particular case.

So, gentlemen, you may take a decree accordingly, and tax the costs against the defendant State Stove Company.

Book 250, Pages 490 and 491.

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI.

No: 65,807

HERBERT H. HODGES AND WIFE, FRANCES A. HODGES, Complainants,

versus

W. H. YATES, JOHN W. GARY, AND STATE STOVE MANUFACTURING COMPANY, Defendants.

FINAL DECREE.

The above styled and numbered cause came on to be and was heard by the Court upon complainants' Original Bill, Answer of both defendants herein, and upon proof, including the sworn testimony of witnesses, the Court having heard and considered the same, together with argument of counsel, and having rendered its opinion from the bench at a conclusion of the trial of this cause, does hereby find and adjudicate that complainants are entitled to receive damages from the defendant, State Stove Manufacturing Company, in the sum of Ten Thousand Four Hundred and 00/100ths Dollars ($10,400.00) for damage to complainants' residence and nominal damages in the sum of Five Hundred Dollars ($500.00) for damages to complainants' personal property, and that the Bill of Complaint should be dismissed against the defendants, W. H.

Yates and John W. Gary, for the reasons stated in the Court's opinion dictated to the Court reporter at the conclusion of the hearing, which opinion is part of the record in this cause and is hereby referred to as the basis for this decree:

It is, therefore, ORDERED, ADJUDGED AND DECREED that complainants have and recover from the defendant, State Stove Manufacturing Company the total sum of Ten Thousand Nine Hundred and 00/100ths Dollars ($10,900.00).

It is FURTHER ORDERED, ADJUDGED AND DECREED that the within cause be, and the same is hereby, dismissed with prejudice against the defendants, W. H. Yates and John W. Gary, and all Court costs accrued herein are hereby assessed against the defendant, State Stove Manufacturing Company, for which execution may issue.

It is FURTHER ORDERED, ADJUDGED AND DECREED that State Stove Manufacturing Company be and it is hereby allowed an appeal herein to the Supreme Court with supersedeas upon its posting the necessary bond.

SO ORDERED, ADJUDGED AND DECREED on this the 8 day of July, 1965.

(S.) W. T. HORTON,
Chancellor.

Filed Jul. 8, 1965. Charles A. Scott, Chancery Clerk, By (S.) Mary Taylor, D. C.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

versus

HERBERT H. HODGES, ET UX.

ETHRIDGE, Chief Justice:

Yates and Gary, contractors, built a home for Herbert H. and Frances Hodges in Webster County, west of Eupora, for a contract price of $11,600. The contractors, who turned the house over to the Hodges in late November 1962, installed in it an electric hot water heater, manufactured by appellant, State Stove Manufacturing Company of Ashland City, Tennessee, which sold the heater to Orgill Brothers, a Memphis wholesaler, in a cardboard container. Orgill Brothers in turn sold it to Yates and Gary, who were both contractors and operators of a hardware store.

On July 26, 1963, about eight months after they had moved into the house, the Hodges and their three children left on a trip to visit relatives in Arkansas. Several hours later, in the afternoon, the electric water heater exploded and substantially destroyed the house and all personal property in it. The two thermostats had locked or frozen in the "on" position. The water heater was found in a field 200 feet from the residence.

The Hodges brought this attachment action in the Chancery Court of Hinds County against State Stove Manufacturing Company (called State Stove), the manufacturer, and Yates and Gary, the contractors. The chancery court dismissed with prejudice the suit against Yates and Gary, finding there was no causal connection between the explosion and "the way that the contractors installed the water heater." The suit was filed on the theory of negligence, the chancellor said, solely by installation of the pressure relief valve in the cold water instead of the hot water line. He held that installation in the cold water line was proper.

As to the manufacturer, the court found: State Stove installed in the tank a plastic dip tube, running from the top to near its bottom, for insertion of cold water. The two thermostats, installed by State Stove, stopped working, and the only safeguard which State Stove took against excessive heat was the thermostats. The heat continued to mount until the plastic dip tube "fused and disintegrated to a point where cold water could not get into the water tank," and stopped up the valves and pipes, thus causing the explosion. The court concluded that the manufacturer was negligent in construction of the water heater. It also said the doctrine of *res ipsa loquitur* applied. The decree awarded damages to the Hodges against State Stove for destruction of their house in the amount of $10,400 (after deducting salvage value). He also gave $500 nominal damages for destruction of personal property, thus giving the Hodges a decree against State Stove for $10,900, from which this appeal was taken

by State Stove. The Hodges appeal from the dismissal of their suit against Yates and Gary.

I.

Appellant contends that there was no privity of contract between it and the Hodges, and that the manufacturer of an appliance such as a hot water heater is not liable to the ultimate purchaser in the absence of some contractual relationship between them. Hence the first issue is whether privity of contract is necessary. We conclude it is not.

The history of the now universally rejected doctrine of privity of contract began in 1842 in the English case of *Winterbottom v. Wright,* 10 M. & W. 109, 152 Eng. Rep. 402 (1842). Subsequently the courts began developing several exceptions which whittled away the general rule derived from the erroneously supposed holding of *Winterbottom v. Wright.* For example, if the seller knew the chattel was dangerous for its intended use and failed to disclose that fact to the buyer, he became liable to a third person injured by such use. Second, liability existed where the chattel was furnished for use on the defendant's premises, treating the user as an invitee. The third was the most important exception, holding the seller liable to a third person in the preparation or sale of an article imminently or inherently dangerous to human safety. In 1916 Judge Cardozo, in *MacPherson v. Buick Motor Company,* held, in a suit against the manufacturer of an automobile with a defective wheel, that the maker was liable for negligence. By placing the car on the

market; it assumed a responsibility to the consumer, resting not on contract but upon the relation arising from the purchase, together with the foreseeability of harm if proper care was not used. 217 N.Y. 382, 111 N.E. 1050 (1916); Prosser, Torts 658-661 (3d ed. 1964).

Prosser summarizes the effect of *MacPherson* in subsequent cases in this way:

> This decision found immediate acceptance, and at the end of some forty years is universal law in the United States, with the barely possible but highly unlikely exception of Mississippi. Massachusetts, which was one of the last jurisdictions to capitulate, has said that 'The MacPherson case caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate.' Some of the courts have continued to speak the language of 'inherent danger,' but it seems clear that this now means nothing more than that substantial harm is to be anticipated if the chattel should be defective. . . . It is certainly the prevailing view that it extends to any product whatever which, if in fact negligently made, may reasonably be expected to be capable of inflicting injury. . . . .
>
> The conclusion is clear that the duty extends to any one who may reasonably be expected to be in the vicinity of the chattel's probable use, and to be endangered if it is defective. . . .
>
> Likewise the liability has been extended to damage to other property; and it is now generally

agreed that the manufacturer is responsible for negligence in the sale of goods, such as animal food, which involve no recognizable risk of personal injury, and are foreseeably dangerous only to property. Prosser, Torts at 661-663.

Privity of contract between a consumer of a product and its manufacturer has not only been abandoned by every State in the Union, except Mississippi, but it has no rational basis for continuance in such an action in this jurisdiction. The manufacturer, by placing a chattel or product upon the market, assumes a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase, together with the foreseeability of harm if proper care is not used. Hence it is appropriate and necessary, in accord with the universal rule elsewhere, that we hold this duty is one imposed by the law because of the defendant's affirmative conduct, which he should know to be likely to affect the interest of another. The rule which we adopt extends to any product which, if in fact negligently made, may reasonably be expected to be capable of inflicting injury. Privity of contract is not necessary in a suit by a consumer against a manufacturer. See Prosser, Torts, 658-672 (3d ed. 1964); Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 128-130 (1958); Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965).

Ford Motor Company v. Myers, 151 Miss. 73, 117 So. 362 (1928), involved a suit by the purchaser of a truck

with a defectively made cuff which broke, causing the truck to become unmanageable and plunge into a ditch, killing the owner. It was said that Myers had no contractual relation with Ford Motor Company, but was a remote vendee; and an automobile was not a dangerous instrumentality. Privity of contract lacking, no action lay against the manufacturer.

However, in several cases beginning in 1954, this Court expressly pretermitted the question of whether privity was necessary in a suit against a manufacturer, but indicated that requirement might be rejected. *E. I. DuPont de Nemours & Co. v. Ladner,* 221 Miss. 378, 73 So.2d 249 (1954), was a suit by Ladner against DuPont for damages to his dairy herd as the result of feeding soybean meal processed with a chemical compound manufactured by DuPont. A judgment for plaintiff was reversed. The Court discussed the "decisions of many courts" that a person who has had no direct contractual relation with the manufacturer may recover against him for negligence. It pretermitted the question of whether the "rule of legal liability" applied in suits against manufacturers of foods and beverages intended for human consumption should be applied to a manufacturer of animal food. 221 Miss. at 399, 400, 73 So.2d at 254, 255. It was held that the proof failed to show that DuPont's negligence was the proximate cause of injury to plaintiff's cattle; that by letter and in person DuPont warned the processor of the cattle feed of the dangers incident to the use of this chemical compound before the cattle feed was manufactured and sold to a retailer;

and the processor's negligence was the intervening, sole proximate cause of plaintiff's damages.

Cox v. Laws, 244 Miss. 696, 145 So.2d 703 (1962), was a suit for the wrongful death of a man, who died within a few minutes after using penicillin ointment on a wound, resulting in an anaphylactic reaction to the ointment. A demurrer to the declaration was sustained, but on appeal this was reversed and the cause remanded. The declaration stated a cause of action, charging a sale in violation of law without a prescription. The opinion reviewed the history of the privity of contract rule, observed that a majority of the courts have abandoned it, and numerous exceptions have been engrafted on it; but it was said that it was not necessary at that time to overrule former opinions requiring privity in order to decide the case.

Harrist v. Spencer-Harris Tool Company, 244 Miss. 84, 140 So.2d 558 (1962), was an action for personal injuries allegedly caused by the faulty manufacture by defendant of steps on an oil rig. Suit was against the manufacturer and dealer, whose demurrers were sustained. The Court referred to the common-law, privity-of-contract rule, and the "dictum in the opinion" in *Ladner.* Numerous articles on the question were cited, and it was said:

> We find, however, that it is not necessary to pass upon or disturb the former opinions of this Court in order to reach a decision in this case.
>
> Assuming, *arguendo,* (but not deciding this point at this time) this Court may ultimately adopt the

> so-called modern concept that a person who has no contractual relations with a manufacturer may recover for injuries caused by negligence of the manufacturer, nevertheless, in this case, we would be required to affirm the trial court because the alleged defects are not considered to be latent or concealed. If we assume there were defects, we think they were apparent and obvious to a casual observer. (244 Miss. at 94, 140 So.2d at 561).

In *Triplett v. American Creosote Works,* 251 Miss. 727, 171 So.2d 342 (1965), plaintiff sued the supplier of an electric power line pole for damages resulting when the pole broke, permitting plaintiff to come in contact with an electric line. A judgment sustaining a demurrer to the declaration was affirmed, on the grounds that the pole was not an imminently dangerous product at the time it was sold to the power association, some fifteen years earlier, and that the alleged negligence of American did not constitute the proximate cause of plaintiff's injury, which, in fact, was the negligence of the power association in construction of its power line. This was the efficient, intervening cause.

Moreover, it has long been established in food and beverage cases in this State that privity of contract is not an essential part of a cause of action against a manufacturer. *Coca-Cola Bottling Works v. Lyons,* 145 Miss. 876, 111 So. 305 (1927), held that there was an "implied warranty" that the bottled drink was pure

and wholesome, and plaintiff need only show that the glass was in the bottle when it left the factory, the consumer had rightful possession of it, and he received injury from drinking it with glass in it. Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939).

In summary, *Ford Motor Company v. Myers* expressly required privity of contract in a suit by a consumer against a manufacturer. It is hereby overruled. *DuPont v. Ladner, Cox v. Laws, Harrist v. Spencer-Harris Tool Company,* and *Triplett v. American Creosote Works* were all decided on grounds not connected with the obsolete privity-of-contract doctrine. In fact, they all rendered caveats to the applicability of this doctrine in Mississippi.

II.

Since privity of contract is not essential in a suit by the consumer against the manufacturer, the next issues are (a) the basis and theory of liability of a manufacturer to a consumer for a defective product, and (b) whether the requirements of the appropriate theory exist in this action by the Hodges.

After careful consideration of the precedents in this and other States, the history of these issues, and the many considerations pertinent to them, which are discussed subsequently, we conclude that the appropriate standards of responsibility are well stated in Section 402A of the American Law Institute's Restatement of Torts (Second), which we adopt insofar as it

applies to a manufacturer of a product and to a contractor who builds and sells a house with the product in it. It states:

> Special Liability of Seller of Product for Physical Harm to User or Consumer—
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The foregoing rule is not exclusive. It does not preclude liability based upon the alternative ground of negligence of the manufacturer or seller, where such negligence can be proved. Restatement (Second), Torts at 348.

An analysis of the doctrine of strict liability in tort is pertinent at this point, before we consider the liability vel non of State Stove, and of Yates and Gary.

Since 1927 the manufacturer of food and drink has been held strictly liable to the consumer in Mississippi. This is also the rule in at least twenty-eight other states. Wade, 19 Sw. L.J. at 11. *Coca-Cola Bottling Works v. Lyons,* 145 Miss. 876, 111 So. 305 (1927), was a suit by Mrs. Lyons for personal injuries received when she drank a bottle of Coca-Cola purchased for her by a companion at a drug store. It contained broken glass, from which she received internal injuries. The Court said it "would discard any question" with reference to negligence. The case was grounded upon "the theory of the breach of an implied warranty," and "three things only are to be ascertained, namely: (1) Was the glass in the bottle when it left the factory and was offered to the public? (2) Did the consumer have title and rightful possession of the bottle? (3) Did the consumer receive injury from drinking the Coca-Cola with the glass in it?" 145 Miss. at 882-883, 111 So. at 306. It was further said that no privity of contract was necessary. Since it was undisputed that the bottle was sealed by the manufacturer, "the glass must have been in the bottle before it left the factory. . . consequently the only thing left to the jury to decide was whether or not there was in fact glass in the bottle of Coca-Cola which Mrs. Lyons drank. . ."

The early food and beverage cases, Prosser says, "suggested nothing very much in the way of a legal

theory to support strict liability. . . ." However, he states:

> In 1927 the Mississippi court came up with the idea of a 'warranty' running with the goods from the manufacturer to the consumer, by analogy to a covenant running with the land. This found general acceptance, and all of the later cases have gone upon the basis of warranty, although it is now generally agreed that it is one made directly to the consumer. Prosser, Torts 678 (3d ed. 1964); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

Nevertheless, recognized scholars in this field of law have concluded that "the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts and what they are trying to accomplish." Prosser, at 679. Breach of warranty is associated with contract law, and traditionally requires some promise or undertaking express or implied. The idea of a warranty introduces quite unnecessary complications into the liability of a manufacturer to a consumer. In the absence of privity, the liability is in tort and not in contract, and a concept of warranty from the contract law of sales is irrelevant. The conclusions are particularly pertinent in this jurisdiction, since the doctrine of a strict liability of the manufacturer to the consumer, without negligence, was developed here beginning in 1927 in *Coca-Cola Bottling Works v. Lyons* and subsequent cases. Moreover, sound reasons for imposing

strict liability on the manufacturer have been fully stated and analyzed in many cases and secondary authorities. See Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); 2 Harper & James, Tort §§ 28.15-28.16 (1956); Restatement (Second), Torts 348-358 (1965); Prosser, Torts 673-674 (3d ed. 1964).

The rationale of this rule is well stated in Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962). Plaintiff was injured while using a power tool, given to him by his wife, who had purchased it from a retailer. The evidence showed that there were inadequate set screws installed by the manufacturer, which permitted the lathe to move away from the piece of wood, allowing it to fly out of the lathe and hit plaintiff on the head. Affirming a judgment for plaintiff against the manufacturer, the California Supreme Court said:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. . .
>
> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the

liability is not assumed by agreement but imposed by law, . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. . . Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or

> more of the implied warranties of the sales act arose. . . 'The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales.' . . . To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use. (377 P.2d at 900-901.)

A few of the many cases applying these principles are: Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W. 2d 873 (1958) (cinder building blocks caused user's home to collapse); Goldberg v. Kollsman Instrument Corp. & American Airlines, 12 N.Y. 2d 82, 191 N.E. 2d 81 (1963) (Manufacturer of airplanes); Deveny v. Rheem Manufacturing Co., 319 F.2d 124 (2d Cir. 1963) (Gas hot water heater); Vandermark v. Ford Motor Company, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (power steering); Morrow v. Caloric Appliance Corp., 372 S.W. 2d 41 (Mo. 1963) (stove).

Dean John Wade summarizes the present state of law in this way:

> It has been only a half-dozen years since the first decision was rendered applying strict liability to articles other than food products. Already there are holdings or other indications in about half of the states that strict liability will extend beyond

> food products. A movement this rapid is almost completely unprecedented and is indicative of a strong trend amounting to a groundswell. When this development is combined with the authority of the *Restatement* and of the numerous writers in the field, the future state of the law becomes quite clear. Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 12 (1965).

Other recent decisions applying strict liability are: Seely v. White Motor Company, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); Suvada v. White Motor Company, 32 Ill. 2d 612, 210 N.E. 2d 182 (1965); Citrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 16 A.2d 69 (1960); Ford Motor Co. v. Lonon, 398 S.W. 2d 240 (Tenn. 1966). See Restatement (Second), Torts, Appendix, § 402A, pp. 1-8 (citing many cases); cf. Hursh, Products Liability §§ 20.12-20.15 (water heaters, negligence).

The extent of strict liability of a manufacturer for harm caused by his products is not that of an insurer. It is strict in the sense that there is no need to prove that the manufacturer was negligent. If the article left the defendant's control in a dangerously unsafe condition, or was not reasonably safe, or was unsafe for its intended use, the defendant is liable whether or not he was at fault in creating that condition, or in failing to discover and eliminate it. Ordinarily the phrase "defective condition" means that the article has

something wrong with it, that it did not function as expected. However, where the article was made as intended, and yet proves to be not reasonably safe, the phrase "defective condition" has no independent meaning. Wade, 19 Sw. L.J. at 15. The issue is whether the product is "unreasonably dangerous" or not reasonably safe. As was said in Morrow v. Caloric Appliance Corp., 372 S.W. 2d 41, 55 (Mo. 1963), it should be "fit and reasonably safe for use by the consumer when used in the manner and for the purpose for which they are manufactured and sold. . ." In other words, the Restatement rule of Section 402A "applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him," or not reasonably safe. Restatement (Second), Torts, Section 402A, comment g.

The manufacturer is liable strictly in tort only if (a) he puts on the market a product which is not reasonably safe, and (b) the plaintiff is injured as a result of a contemplated use of it. The action is different from negligence mainly in the element of *scienter*: Plaintiff will not need to prove either that defendant negligently created the unsafe condition of the product or that he was aware of it. Wade, 19 Sw. L.J. at 15, 25. Strict products liability does not require a perfectly safe product. A simple instrument like a hammer or an axe can injure any one if used unskillfully. But on the other hand, a manufacturer is liable if it puts on the market a product which is not reasonably safe and the plaintiff is injured as the result of a contem-

plated use of it. Moreover, whether a product is reasonably safe or not is a flexible standard responsive to the facts of each case. Wade, 19 Sw. L.J. at 17. It is a question of fact whether the particular article involved was reasonably safe when it left the control of the manufacturer.

III.

A majority of the Judges, being Judges Gillespie, Jones, Brady, Smith and Robertson, are of the opinion, and the Court holds that State Stove is not liable to complainants. Hence the decree of the chancery court is reversed in part, and judgment is rendered here for appellant, State Stove. Four of the Judges, being the writer of this opinion and Judges Rodgers, Patterson and Inzer, are of the opinion that State Stove is liable. That view is discussed in a separate opinion, dissenting only to this part of the decision.

The Court holds that State Stove has no liability here, under Restatement section 402A, (1) because the water heater as manufactured was not in "a defective condition unreasonably dangerous to the user or consumer or to his property"; and (2) because it was not expected to and did not reach the Hodges "without substantial change in the condition in which it . . . (was) sold." (3) Further, the negligent failure of Yates and Gary, through their agent Pittman, to follow the instructions of the manufacturer in installing the water heater, by failing to use a temperature relief valve, was the intervening, sole proximate cause of the explosion.

State Stove installed the two thermostats controlling the two heating units in the water heater at its factory, and the plastic dip tube or pipe carrying cold water from the top to the bottom of the tank. Neither the thermostats nor the plastic dip tube were manufactured by State Stove. It purchased them from other manufacturers and installed them at its factory. After completion of the manufacturing process by State Stove, the appliance was then sealed or packaged in a cardboard container, and sold to Orgill Brothers, a wholesaler. Orgill shipped the enclosed package containing the heater to the contractors, Yates and Gary, who built the house and installed it in the residence.

Yates and Gary hired a plumber, Pittman, to perform the actual installation. Pittman was an agent of Yates and Gary and not an independent contractor. Sears, Roebuck & Company v. Creekmore, 199 Miss. 48, 23 So.2d 250 (1945). Moreover, installation of the heater was a nondelegable duty of the contractors. Weldon v. Lehman, 226 Miss. 600, 84 So.2d 796 (1956); Federal Compress & Warehouse Co. v. Swilley, 252 Miss. 103, 171 So.2d 333 (1965).

The contractors furnished Pittman with a pressure relief valve and a check valve to be installed with the water heater. The check valve was inserted on the cold water line. It precluded the water from flowing back from the heater to the source of supply, a well and electric water pump. The pressure relief valve was installed in the cold water line at a point underneath the house. The record reflects that installation

in the cold water line, rather than the hot water line as asserted by complainants, was proper.

No plumbing code in Webster County required a temperature relief valve, in addition to the pressure valve. At the time of this installation plumbers in that area customarily were using only pressure valves, and were not using temperature valves, although since then they have been using them. However, the FHA, the VA, and the National Plumbing Code require both.

State Stove's set of instructions enclosed with the heater directed installation of a combination temperature and pressure relief valve. It contained detailed drawings showing the way to install the prescribed combination valve. The warranty stated that it would not be effective unless the heater "was equipped with a suitable temperature and pressure relief valve." However, Pittman did not install a temperature valve on the hot water heater. Although he did not read these particular instructions, he admitted that he knew they directed it.

As to the manufacturer, the chancery court found that the thermostats, installed by State Stove, failed to work. This caused the temperature in the tank to rise to a high point and caused the plastic dip tube in the tank, placed therein by the manufacturer, to fuse and disintegrate "to a point where cold water could not get into the water tank," and that the heater would not have exploded if the dip tube had not

stopped up the valves and pipes of the heater. The trial court stated that "the company, knowing what might happen to the plastic dip tube, should have added some safeguards against the thermostats not working, in order to prevent the plastic dip tube from fusing and disintegrating, but they didn't. I hold that that was negligence in the manufacture of this hot water tank." It further held that the doctrine of *res ipsa loquitur* applied.

However, it is undisputed that, if Yates and Gary had followed the instructions of State Stove, the combination valve with a temperature control would have prevented the temperature in the tank from reaching the point where steam would be produced (312 degrees F.), when the explosion resulted, and where the dip tube would melt. The chancery court erred in not attaching significance to this important fact

Further, the heater was not expected to and did not reach the Hodges "without substantial change in the condition in which" the manufacturer sold it. State Stove clearly directed the installer to place a combination valve on it. The evidence shows that manufacturers of water heaters commonly do not install such safety appliances, which are customarily and more conveniently installed by a plumber. Subsequent installation of safety valves by another is in this sense a substantial change in condition. In short, the heater was not used in the way it was intended to be used, as defined (for example) in *Greenman v. Yuba Power Products.*

Moreover, there is no evidence to show that the heater, as manufactured by appellant, was in a defective condition and unreasonably dangerous. Thermostats are mechanical in nature, not safety appliances, and the evidence reflects the obvious fact that all mechanical devices may fail at one time or another. The mere fact that they locked in the "on" position does not suffice to show that the thermostats were defective when manufactured. Any mechanical contrivance may fail to work. Their failure to function after the lapse of seven months of use does not indicate a defect at the time the heater left the manufacturer. Foreseeability cannot be imputed to State Stove under these facts.

And finally, the failure of Yates and Gary to install the prescribed and required temperature relief valve, which would have prevented the explosion, was an intervening, sole proximate cause of the damages suffered by complainants. See Ford Motor Company v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840, 164 A.L.R. 364 (1946); Annot., 164 A.L.R. 371 (1946); Jones v. Hartman Beverage Co., 203 S.W. 2d 166 (Tenn. Ct. App. 1946); Prosser, Torts § 51 (3d ed. 1964).

E. I. DuPont de Nemours & Company v. Ladner, 221 Miss. 378, 73 So.2d 249 (1954), is directly in point on this issue. There the manufacturer of the chemical compound gave express notice to the processor not to use it for cattle feed. The processor ignored this warning, and its failure to heed it was the intervening, sole proximate cause of the purchaser's damages.

IV.

The Hodges took a concurrent direct appeal against Yates and Gary, the contractors, who were dismissed by the chancery court. *It found Yates and Gary were not negligent in installing the pressure relief valve on the cold instead of the hot water line. The bill of complaint charged them with negligence in improperly placing the pressure valve in the cold water line. It further averred that Yates and Gary held themselves up to the public and complainants as being skilled and experienced general contractors, qualified to construct a dwelling and to install any and all appliances needed in it; and that they "were required to install the hot water heater of complainants in such a manner . . . as to not endanger the property, health, lives and safety of complainants. . ." However, the bill averred also that as a result of the joint concurrent negligence of the defendants the explosion ensued and complainants' home was destroyed. It had a prayer for general relief.*

The liability of Yates and Gary rests both upon negligence and also upon strict liability in tort, within the limitations defined above. The specific negligence alleged in the bill (installation of pressure relief valve in cold water line) does not preclude us from determining whether they are liable for negligence and strictly liable in tort. Under the prayer in the bill for general relief, complainants may have any other relief than that specifically prayed if it is within the scope of the facts of the bill, not inconsistent with its

purpose, and cannot be said to surprise defendant. Griffith, Miss. Chancery Practice §§ 186, 187 (1950).

Yates and Gary, through Pittman, were negligent in failing to install a combination pressure and temperature valve in the water heater. Pittman knew the instructions directed this be done.

Yates and Gary were more than retailers and wholesalers. They not only sold the water heater to the Hodges, but they constructed the house for them and installed the heater in it. As installed by them, without a temperature valve, this product was in a defective condition and was not reasonably safe for its intended purpose. These contractors were engaged in the business of selling and installing such a product in homes constructed by them, and they expected it to reach the user or consumer in that condition. So, they are also strictly liable in tort. Hence the chancery court erred in dismissing the action against Yates and Gary. That part of the decree is reversed and judgment is rendered here on liability and damages to the house against Yates and Gary.

V.

There is no substantial dispute in the record as to the damages to the house of $10,400. The trial court held that complainants suffered only nominal damages of $500 for the destruction of their household belonging and personal effects. It stated there was no rule or guide in the evidence by which it could ascertain damages to the personal property; that cost is a fac-

tor, but not the only one, and, since complainants failed to prove actual damages to personalty, they were entitled only to "nominal damages."

Complainants introduced in evidence photographs of the damages to the exterior and interior of their residence. Mr. Hodges testified that all personal belongings in the house were destroyed. Asked how he placed a valuation on these objects of $10,358.33, he said partly by memory, and where they didn't have records or receipts for the items, they compared it with other merchandise which would replace the given items. He then introduced in evidence a detailed itemization, reflecting cost and estimated depreciation of each item. On cross-examination, he said that they undertook to salvage the items of personal property which were usable, but they were very few. They did not have insurance on household furniture. He admitted that original cost did not represent the value of the articles at the time of the fire.

The general rule as to measure of damages for loss or conversion of, or injuries to wearing apparel or household goods is concisely summarized in an annotation in 63 A.L.R. 240 at 241, 254 (1929):

> It is generally held that the amount of recovery for the loss or conversion of, or injury to, wearing apparel or household goods, is not limited to the price which could be realized by a sale in the market; but that the owner may recover the value of the goods to him, based on his actual money loss resulting from his being deprived of the

property, or the difference in actual value caused by the injury, excluding any fanciful or sentimental values which he might place on them. (63 A.L.R. at 241).

In determining the measure of damages for the loss or conversion of, or injury to, wearing apparel or household goods, evidence of the cost of the articles when new, in connection with evidence of the wear and tear, the length of time they have been in use, their condition at the time of the loss or injury, the expense of replacing them with other goods of a similar kind and in a similar condition, and any other facts which will enable the jury to determine the worth of the goods to the owner at the time of the loss, is proper for the consideration of the jury. (63 A.L.R. at 254)

To the same effect are 22 Am.Jur. 2d *Damages* § 150 (1965), and McCormick, Damages § 45 (1935). Apparently this jurisdiction has no decisions on the measure of damages to household goods and personal effects. Louisville & N.R. v. Stewart, 78 Miss. 600, 29 So. 394 (1901), applied the rule of value to the owner for loss of an oil portrait. *Austin v. Millspaugh,* 90 Miss. 354, 43 So. 305 (1907), reversed an award for nominal damages only to an architect who lost at a hotel architectural drawings and plans. It applied the test of reasonable, just and fair value to the owner. See Annot. 12 A.L.R. 2d 902 (1950).

Sears, Roebuck & Co. v. Creekmore, 199 Miss. 48, 23 So.2d 250 (1945), involved destruction by fire of a

house and its contents, but the Court dealt principally with the before and after rule as to the house. The instructions gave no guidance to the jury as to a measure of damages. The case was reversed and remanded on that issue only. It was indicated that an estimate of replacement costs may be relevant along with other factors. See Copiah Dairies, Inc. v. Addkison, 247 Miss. 327, 153 So.2d 689 (1963).

The undisputed evidence shows that the Hodges suffered considerably more than the merely nominal damages found by the chancery court, for loss of their personal property and household effects from the explosion. As to Yates and Gary, this case is remanded for ascertainment of damages to the household effects and personal property of complainant, in accordance with the above rules and standards.

In summary, on the direct appeal of State Stove Manufacturing Company, the decree is reversed and judgment is rendered here for that appellant. As to the appeal of Mr. and Mrs. Hodges from the decree dismissing Yates and Gary, the decree is reversed and judgment rendered here adjudicating liability of Yates and Gary for damages to the house of $10,400, and as to them the cause is reversed and remanded for the limited purpose only of determining the quantum of such personal property damages

ON DIRECT APPEAL OF STATE STOVE MANUFACTURING COMPANY, REVERSED AND JUDGMENT RENDERED HERE FOR THAT

APPELLANT; ON CROSS-APPEAL OF THE HODGES AS TO STATE STOVE, AFFIRMED; ON DIRECT APPEAL OF THE HODGES AS TO YATES AND GARY, REVERSED AND JUDGMENT RENDERED HERE FOR COMPLAINANTS AGAINST THEM AS TO LIABILITY AND DAMAGES TO HOUSE, AND REMANDED SOLELY FOR LIMITED PURPOSE OF FIXING DAMAGES TO HOUSEHOLD EFFECTS AND PERSONAL PROPERTY.

ALL JUSTICES CONCUR, EXCEPT ETHRIDGE, C. J., AND RODGERS, PATTERSON, AND INZER, JJ., DISSENT IN PART, AS TO JUDGMENT RENDERED FOR STATE STOVE MANUFACTURING COMPANY.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

versus

HERBERT H. HODGES, ET UX.

ETHRIDGE, Chief Justice, Dissenting in Part:

The only point of difference among us lies in that part of the controlling opinion (Section III) which relieves State Stove Manufacturing Company of liability. The Court properly holds that State Stove's responsibility should be measured by Section 402A of the Restatement (Second) of Torts.

One question is whether the water heater as manufactured was in a defective condition unreasonably dangerous to or not reasonably safe for the consumer or his property. It is undisputed that the two thermostats, after only seven months of use, failed to work, and permitted the temperature to reach a high point, resulting in the explosion. It is unnecessary for complainants to prove, I think, specifically that the thermostats had some defective needle, screw, or other working part in them to come within this requirement. At this point in time, it is manifest that the thermostats were not reasonably safe, or were unsafe for their intended use. They failed to work after only seven months of use, when the express warranty

of State Stove, not available here, was for ten years. It is not necessary to use *res ipsa loquitur* to conclude that the thermostats had something wrong with them, since they did not function as expected. By analogy to the law of sales, they were not fit and reasonably safe for use by the consumer.

The Court holds further that the water heater was not used in the manner for which it was manufactured and sold by State Stove, since the manufacturer directed installation of a combination pressure and temperature relief valve, and this was not done. Here an issue of policy arises which I think the Court must consider. The water heater purported to be, as packaged, a product usable for the purpose constructed, after installation of pipes. The thermostats were safety devices, it seems to me, although the Court holds they were not. They were designed to control the temperature, just as much as a temperature and pressure relief valve would at a higher level. It is not unreasonable for the law to require a manufacturer of a product potentially dangerous, such as a hot water heater, to install on it at the factory safety devices, such as a combination temperature and pressure relief valve. The manufacturer is bound to be aware of the varieties of plumbers who install such appliances, and of the foreseeable nature of a failure of some plumbers in the fifty states to install specified safety devices. The effect of the controlling opinion's interpretation of the manufacturer's instructions and warranty is to shift from the manufacturer, who knows the problem and the potentialities of in-

jury, the risk of such injury, and to transfer it to an innocent consumer who has no knowledge of the instructions or of the method of installation by a builder of his house. These practical factors should put on the manufacturer of a water heater the duty to install at the factory any reasonable safety appliances. In short, the product as it left State Stove's factory was, in my opinion, in a defective condition unreasonably dangerous to the consumer, or not reasonably safe, or unsafe for its intended use. Certainly when it reached the ultimate consumer, the heater was in a condition not contemplated by him and not reasonably safe.

Closely related to that factor is the requirement that the product is expected to and does reach the consumer "without substantial change in the condition in which it is sold." The thermostats, which admittedly failed to work after only seven months of use, were not touched or changed in any way by the Hodges after they moved into the house. There was no change whatever in the condition in which they were sold by State Stove. Nor did the manufacturer expect them to be changed by the consumer. The record reflects that the company which manufactured the thermostats, and sold them to State Stove, preset them at a given temperature.

It is not good law or sound judicial policy to permit a manufacturer to escape liability by delegating to an intermediary the duty to install safety devices to protect against defects and failures in the product,

which the manufacturer by its own testimony admitted it knew could occur. The duty of a manufacturer of a product which may cause substantial harm to the consumer should include a nondelegable duty to install on the product, such as a water heater, the necessary and reasonable safety appliances at the factory. As to independent contractors and employers, such a duty has been imposed by the common law in a long catalogue of cases. The criterion of the nondelegable character of such duties is primarily the conclusion of the courts "that the responsibility is so important to the community that . . . (here the manufacturer) should not be permitted to transfer it to another." Prosser, *Torts* §70 (3d ed. 1964).

A recent case applying this principle in the field of products liability is *Vandermark v. Ford Motor Company*, 37 Cal. Rptr. 896, 391 P.2d 168 (1964). The manufacturer of an automobile with defective power brakes was held strictly liable in tort, although the manufacturer delegated the final steps in checking and completing the product to its authorized dealer, which had failed to adjust the brakes as it was supposed to do. The Court said that Ford could not "delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects," and could not "escape liability on the ground that the defect . . . may have been caused by something one of its authorized dealers did or failed to do." 391 P.2d at 171. The fact that there was some element of agency by the franchised dealer does not minimize the basis of the decision in *Vandermark:* The manufac-

turer could not shift his responsibility to consumers for defects in the product, as manufactured, by admonishing the intermediate dealer to take certain safety precautions.

State Stove's instructions attached to the water heater directed the installer to put on it a combination temperature and pressure relief valve. Its warranty did not apply unless the combination valve was used. State Stove argues, and the Court holds, that the failure of Yates and Gary, and their agent Pittman, to install the combination valve was an intervening act of negligence which operated to terminate the effect of State Stove's marketing of the unsafe heater with defective thermostats and inadequate dip tube.

However, the trial court was warranted, I think, in finding that the unsafe condition of the product was a substantial factor in bringing about complainants' damages. This is ordinarly an issue for the trier of fact. This involves the question of whether State Stove can shift its responsibility to the intermediate purchaser. It is undisputed that the thermostats did not work. As Prosser states, it is a "question of the extent of the defendant's original obligation." So the issue is whether State Stove should be relieved of liability for something that it has caused, along with other causes. Prosser, Torts 309 (3d ed. 1964).

Four-County Electric Power Association v. Clardy, 221 Miss. 403, 73 So.2d 144, 149 (1954), was a suit for

personal injuries to a well driller who came in contact with defendant's high voltage electric line. It was contended that plaintiff's own negligence was the sole intervening cause of his injuries. But it was held that "whether there was an independent, intervening cause of appellee's injuries, wholly disconnected from and having no causal relation to appellant's negligence, was a question which was properly submitted to the jury."

The acts of State Stove and of Yates and Gary were, in a sense, concurring causes of the explosion. See 38 Am.Jur., *Negligence* §§ 67-72 (1941). Moreover, the omission of Yates and Gary should be regarded as a normal incident of the risks State Stove created. A normal intervening cause of this type does not supersede the defendant's liability. Prosser, Torts 315 (3d ed. 1964).

The mere fact that a product is to undergo the installation of pipes and valves should not be sufficient to relieve the seller of liability under the Restatement rule. Here the defects which began the chain of events leading to the explosion originated with the defective thermostats, and the dip tube. See Restatement (Second), Torts § 402A, comment p. In its manufactured condition, the water heater was not reasonably safe for the use intended. Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 186 (196[illegible]. The manufacturer should not escape liability by delegating to an intermediary the duty to install safety devices to protect against defects in the product.

Furthermore, if we consider State Stove's instructions and limited warranty as in the nature of a disclaimer, such does not bar a tort action under these circumstances. There is no evidence to show that the Hodges knew of, or much less consented to, any such disclaimer. See Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 Stanford L.Rev. 974 (1966). Restatement (Second), Torts § 402A, comment m, concludes that the consumer's cause of action "is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands."

E. I. Du Pont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So.2d 249 (1954), is not controlling here, I suggest. The manufacturer of a chemical compound used in processing soybean meal notified the processor by letter and in person that the compound should not be used for cattle feed. Nevertheless, the processor so used it. It was held that the processor's conscious acts of refusing to heed these warnings, and selling the feed to another person for cattle, was an independent, efficient intervening cause, not foreseeable by Du Pont, and thus superseded Du Pont's responsibility for its original negligence.

In the instant case, neither the instructions nor the limited warranty notified buyers that the thermostats were defective or not reasonably safe for the use for which they were intended. They simply directed

the use of a combination valve. Moreover, *Ladner* did not consider the doctrine of strict liability in tort. That doctrine, the sequence of facts, the unsafe nature of the thermostats and dip tube, and other stated circumstances do not justify relieving State Stove of its responsibility for complainants' damages, and shifting it exclusively to Yates and Gary.

In a negligence action, an intervening act, the likelihood of which was definitely increased by defendant's act or caused by defendant's act, is not a superseding proximate cause of injuries incurred by reason of it. Hill v. Wilson, 216 Ark. 179, 224 S.W. 2d 797 (1949).

Where negligence is an issue, the rule is settled that where one party's negligence cooperates with the negligence of another, both are liable for damages ensuing from them. In short, both actors are liable where the negligence of two or more people concurrently bring about an injury to another. Keith v. Yazoo & M.V.R. Co., 168 Miss. 519, 151 So. 916 (1934); Cumberland Tel. & Tel. Co. v. Woodham, 99 Miss. 318, 54 So. 890 (1911). The effect of the former negligence had not ceased, "but cooperated with that of the other in effecting the injury." So if a defendant is negligent, and this negligence combines with that of another, or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence, without such other independent intervening cause, would not have produced

the injury. Gulf Ref. Co. v. Brown, 196 Miss. 131, 148, 16 So.2d 765, 769 (1944).

Again, the negligence action offers some guide as to the effect of misconduct of the intermediate dealer upon the strict liability of the manufacturer. It is well settled that the dealer's negligence in failing to discover the defect, or to take precautions against its existence, will not relieve the maker of liability. Cf. Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 102 N.W. 793 (1905); Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N.W. 541 (1918); Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N.W. 566 (1920).

Here there is causation in fact, and also proximate or responsible cause reaching to State Stove. Prosser, Torts 282-309 (3d ed. 1964).

For these reasons, I respectfully dissent in part, but only from the reversal of the decree against State Stove. On that point, I would affirm.

RODGERS, PATTERSON and INZER, JJ., Join in this Dissenting Opinion.

IN THE SUPREME COURT OF MISSISSIPPI.

Friday, July 8, 1966, Court Sitting.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

versus

HERBERT H. HODGES, ET UX.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 8th day of July, 1965—be and the same is hereby reversed and judgment is entered here for the appellant, State Stove Manufacturing Company on direct appeal. It is therefore ordered and adjudged and decreed that the appellees Herbert H. Hodges and Frances Hodges do have and recover nothing against State Stove Manufacturing Company; on cross-appeal of Herbert Hodges and Frances Hodges as to State Stove Manufacturing Company, the case is affirmed. It is further ordered and adjudged and decreed that on direct appeal of Herbert Hodges and Frances Hodges as to W. H. Yates and John W. Gary from the decree dismissing W. H. Yates

and John W. Gary, the decree is reversed and judgment is entered here adjudicating liability of W. H. Yates and John W. Gary for damages to the house of $10,400.00, and as to them the case is reversed and remanded for the limited purpose only of determining the quantum of such personal property damages. The costs are taxed one-half against Herbert Hodges and Frances Hodges and one-half against W. H. Yates and John W. Gary, for which let proper process issue.

Minute Book "BN", Page 608.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

Appellants,

versus

HERBERT H. HODGES, ET UX.,

Appellees.

SUGGESTION OF ERROR.

Now come W. H. Yates and John W. Gary, Appellees, and feeling that there is error in the judgment rendered by this Court in this cause, and pursuant to the grant of thirty (30) days additional time in which to file this Suggestion of Error and brief, hereby present this their Suggestion of Error and assign as error the following grounds, to-wit:—

1. The Court erred in entertaining the direct appeal against Yates and Gary; without passing on Appellees Motion to dismiss.

2. The Court erred in not dismissing Mr. and Mrs. Hodges' direct appeal from the decree discharging Yates and Gary.

3. The Court erred in granting special relief under the prayer for general relief, when there was no specific charge in the bill to support it.

4. The Court erred in rendering a judgment against Appellees, Yates and Gary, on a charge of negligence not specifically charged in the bill of complaint.

5. The Court had no jurisdiction to render a decree against Yates and Gary on a ground of negligence that was not an issue under the pleadings.

6. The decree rendered against Yates and Gary herein is null and void for the reason that the ground of negligence upon which this Court rendered the judgment was not specifically charged in the bill, was not an issue in the case, and Yates and Gary were not charged with it, had no notice of it and no opportunity to be heard upon it. The Trial Court had no jurisdiction to render it and hence the Supreme Court had no jurisdiction to render it and it violates the due process clauses of Section 14 of the Constitution of the State of Mississippi, and the Fourteenth Amendment to

the Federal Constitution and is void and of no effect and cannot be enforced.

Respectfully submitted,
W. D. GARY,
Eupora, Mississippi.

BARNETT, MONTGOMERY,
McCLINTOCK & CUNNINGHAM,
By M. B. MONTGOMERY,
(M. B. Montgomery),
315 Barnett Building,
Jackson, Mississippi,
Attorneys for Appellees,
W. H. Yates and John W. Gary.

CERTIFICATE.

I, M. B. Montgomery, one of the Attorneys of record for the Appellees herein, W. H. Yates and John W. Gary, do hereby certify that I have this day mailed by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Suggestion of Error on behalf of Yates and Gary to Honorable W. H. Jolly, P. O. Box 743, Columbus, Mississippi, and to Honorable Dewitt T. Hicks, Jr., Threadgill and Hicks, P. O. Box 1094, Columbus, Mississippi, Attorneys of record for Appellants, Herbert H. Hodges, et ux., and to Honorable Junior O'Mara, Attorney at Law, P. O. Box 1250, Jackson, Mississippi, Attorney of record for Appellant, State Stove Manufacturing Company.

This, the 16 day of August, 1966.

M. B. MONTGOMERY,
(M. B. Montgomery)

Tuesday, September 27, 1966, Court Sitting.

No. 44,023.

STATE STOVE MFG., COMPANY, ET AL.,

versus

HERBERT H. HODGES, ET AL.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Received and Filed Oct. 7, 1966. Jules H. Kendrick, Clerk, Yvonne Burnham, D.C.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

Appellants,

versus

HERBERT H. HODGES, ET UX,

Appellees.

MOTION TO CORRECT JUDGMENT.

Now come W. H. Yates and John W. Gary, appellees in the above entitled cause, wherein judgment was entered in this Court "adjudicating liability of W. H. Yates and John W. Gary for damages to the house of $10,400.00 and as to them the case is reversed and remanded for the limited purpose only of determining the quantum of such personal property damages", to which judgment appellees' suggestion or error was overruled by this Court on the 24th day of September, 1966, and move the Court to correct and clarify such judgment so that the appellees may be informed as to whether this Court has thereby entered a final judgment against W. H. Yates and John W. Gary for $10,400.00 and nothing more remains to be

done to authorize the issuance of execution thereon, or whether the judgment entered in this case reverses and remands the case to the trial court solely for the limited purpose of the personal property and then entering judgment in the trial court for the sum of $10,400.00 plus the amount of the quantum of damages determined by the Court to have been suffered because of loss or damage to the personal property all in one judgment.

It is necessary that said judgment be clarified in order that appellees may be informed as to whether such judgment is final in order to determine their procedure with respect to a petition to the Supreme Court of the United States for a writ of certiorari,

BARNETT, MONTGOMERY,
McCLINTOCK & CUNNINGHAM,
By E. H. CUNNINGHAM, JR.,
(E. H. Cunningham, Jr.),
By M. B. MONTGOMERY,
(M. B. Montgomery),
315-21 Barnett Building,
Jackson, Mississippi,
Solicitors for Appellees.

CERTIFICATE.

We, E. H. Cunningham, Jr., and M. B. Montgomery, attorneys of record for the appellees herein, W. H. Yates and John W. Gary, do hereby certify that we have this day mailed by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Motion to Correct Judgment to Honorable W. H. Jolly, P. O. Box 743, Columbus, Mississippi, and to Honorable Dewitt T. Hicks, Jr., Threadgill and Hicks, P. O. Box 1094, Columbus, Mississippi, attorneys of record for appellants

This, the 7th day of October, 1966.

E. H. CUNNINGHAM, JR.,
(E. H. Cunningham, Jr.),
M. B. MONTGOMERY,
(M. B. Montgomery).

Monday, October 24, 1966.

No. 44,023.

STATE STOVE MANUFACTURING CO., ET AL.,

versus

HERBERT H. HODGES, ET UX.

This cause this day came on to be heard on the motion to correct judgment filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said motion be and the same is hereby overruled.

Minute Book "BO" Page 14.

Received and Filed Oct. 25, 1966. Jules H. Kendrick, Clerk, Yvonne Burnham, D.C.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

Appellants,

versus

HERBERT H. HODGES, ET UX.,

Appellees.

APPLICATION FOR STAY.

Now comes W. H. Yates and John W. Gary and respectfully show unto the Court that they desire to apply to the Supreme Court of the United States for a Writ of Certiorari to this Honorable Court from the final judgment and decision of this Court entered on the 8th day of July, 1966, and do hereby pray that said judgment and decree of the 8th day of July, 1966, be stayed in all respects pending final disposition of the Application for a Writ of Certiorari and that an

order be made by this Court with respect to the bond for such stay.

Respectfully submitted,

W. H. YATES.
JOHN W. GARY.

By BARNETT, MONTGOMERY,
McCLINTOCK & CUNNINGHAM,

By M. B. MONTGOMERY,
(M. B. Montgomery),
315-21 Barnett Building,
Jackson, Mississippi.

Received and Filed Oct. 25, 1966. Jules H. Kendrick, Clerk, Yvonne Burnham, D.C.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 44,023.

STATE STOVE MANUFACTURING COMPANY, ET AL.,

Appellants,

versus

HERBERT H. HODGES, ET UX,

Appellees.

ORDER GRANTING STAY.

This day coming on for hearing the Motion of W. H. Yates and John W. Gary for a stay from the final judgment in the above entitled cause entered on the 8th day of July, 1966, and having presented their petition for an order staying said judgment and decision,

Now, therefore, it is hereby ORDERED that upon the approval of a supersedeas bond as hereinafter provided for said judgment and decision of the 8th day of July, 1966, be and the same is hereby stayed in all respects pending application of W. H. Yates

and John W. Gary in the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of Mississippi, provided the application for the Writ is filed within the time required by law.

It is further ORDERED that a supersedeas bond be and the same is hereby fixed in the amount of $13,000.00 with good and sufficient sureties and shall be conditioned as may be required by law.

ROBERT G. GILLESPIE,
Presiding Chief Justice, Supreme
Court of Mississippi.

Received and Filed Nov. 17, 1966. Jules H. Kendrick, Clerk, Yvonne Burnham, D.C.

IN THE SUPREME COURT OF STATE OF MISSISSIPPI.

W. H. YATES AND JOHN W. GARY,
Plaintiff-Appellants,

versus

HERBERT H. HODGES AND MRS. HERBERT H. HODGES,
Defendant-Appellees.

APPEAL BOND.

Know All Men By These Presents: That we, W. H. Yates and John W. Gary as Principal, and the United States Fidelity and Guaranty Company, a corporation of Maryland, domiciled at Baltimore, in said State, as Surety, are held and firmly bound unto the State of Mississippi in the penal sum of Thirteen thousand and 00/100 Dollars ($13,000.00), for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors and assigns jointly and severally, firmly by these presents, this 4th day of November, A.D. 1966.

The Condition Of The Above Obligation Is Such, That whereas in a case lately pending in the Supreme Court of Mississippi, a judgment was rendered on the 8th day of July, 1966, by said Supreme Court, in favor

of Herbert H. Hodges and Mrs. Herbert H. Hodges against said W. H. Yates and John W. Gary and the said W. H. Yates and John W. Gary feeling aggrieved thereby and having prayed for and obtained a stay of said judgment pending application for a writ of certiorari in the Supreme Court of the United States with supersedeas.

Now Therefore, If the said obligator shall pay and satisfy the judgment in full together with interest, all costs of appeal, and damages for delay and of the Court below, in case the judgment be affirmed, then this obligation to be void, otherwise to remain in full force and effect.

JOHN W. GARY, (SEAL)
W. H. YATES, (SEAL)
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By C. P. FORTIER, JR.,
Attorney-in-Fact.

Signed, sealed and delivered in the presence of

.....

.....

The foregoing bond approved by me, this 17th day of November, 1966.

ROBERT G. GILLESPIE,
Associate Justice of the Supreme Court of the State of Mississippi.

Supreme Court of the United States

OCTOBER TERM, 1966.

Office-Supreme Court, U.S.
FILED
JAN 23 1967
JOHN F. DAVIS, CLERK

No. 898

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES and FRANCES A. HODGES,
Respondents.

BRIEF OF RESPONDENTS AGAINST PETITION FOR WRIT OF CERTIORARI.

THREADGILL & HICKS,
TAYLOR B. SMITH,
W. H. JOLLY,
213 North 5th Street,
Columbus, Mississippi.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 898.

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents.

BRIEF OF RESPONDENTS AGAINST PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The Respondents herein filed their Bill of Complaint in the Chancery Court of Hinds County, Mississippi, against W. H. Yates and John W. Gary, the Petitioners herein, and also against a co-defendant, State Stove Manufacturing Company. A true copy of the Bill of Complaint is printed in the Appendix hereto at page 9.

All the defendants filed their answers. We deem it necessary, however, to an understanding of the issues presently before this Court to print only the answer

of State Stove Manufacturing Company which is shown in the Appendix hereto at page 19.

On appeal, the Supreme Court of Mississippi rendered Judgment against Petitioners.

Counsel for Petitioners seek a review by this Court of this case for the reason that the Bill of Complaint charges the Petitioners, herein, with negligence in installing a pressure relief valve in the cold water line of a water heater rather than the hot water line, whereas at the trial of the case it was proved by State Stove Manufacturing Company, the other defendant, that Petitioners herein were negligent in that they failed to follow the instructions of State Stove Manufacturing Company in the installation of the proper relief valve for the heater.

This question was fully briefed by all the parties when the case was pending before the Supreme Court of Mississippi. That court in a unanimous holding, decided the issue against Petitioners.

The Respondents take the position that this issue was purely procedural in the trial court and the Supreme Court of the State of Mississippi and that Petitioners were denied no substantive rights. Further that no federal question is involved.

The Respondents deny that the judgment of the Supreme Court of Mississippi constitutes a denial of rights guaranteed to Petitioners by the due process clause of the Fourteenth Amendment to the Constitu-

tion of the United States for the reasons hereinafter presented:

POINT ONE. The Petitioners, Defendants Below, Were Not Surprised By The Proof That They Negligently Installed The Hot Water Heater And That They Failed To Follow The Instructions Of The Manufacturer.

The answer of the State Stove Manufacturing Company was filed in the trial court many months prior to the hearing. In the answer of the manufacturer of the heater, in paragraph 8 (a) they charged the Petitioners with such negligence. This negligence was admitted by Pittman, the agent and employee of the Petitioners herein, and the man who installed the hot water heater for them. This is shown in the opinion of the Supreme Court of the State of Mississippi at page 44 of the Appendix to Petitioners' Petition for Writ of Certiorari.

This information was solely known to Petitioners and their agent and it was impossible for Respondents to allege it in the Bill of Complaint.

This negligence on the part of Petitioners, admitted by their agent and employee, was before the court. As stated, it was proved by the admission of Petitioners' agent and pursuant to the allegations of paragraph 8 (a) of the answer of State Stove Manufacturing Company hereinbefore mentioned.

Judge Virgil A. Griffith, a long time Chancery Judge and Supreme Court Judge in the State of Mississippi wrote a handbook on Mississippi Chancery practice in 1925. This book has been the guide of the bench and bar of the State since said date. This work was cited by the Supreme Court of Mississippi in opinion, set out on page 48 in the Appendix to Petitioners' Petition for Writ of Certiorari. Section 186 of Judge Griffith's work, referred to by the Mississippi Supreme Court, is printed herein in the Appendix at page 23.

We assert that the proof of negligence against Petitioners although not set out in the Bill of Complaint but set out in the affirmative answer of a co-defendant was clearly before the Court under the purview of said section. Neither the trial court or the Mississippi Supreme Court could ignore this evidence.

The cases cited by counsel for Petitioners are not applicable to the case at bar. We are not faced with a question of something being proved that was not alleged. It was alleged by the co-defendant of the Petitioners and they had clear notice of it and their co-defendant proved their negligence by their own agent and employee.

We therefore urge that no federal question is involved and this Court has no jurisdiction to hear the cause on its merits.

POINT TWO. If This Court Had Jurisdiction Of This Cause Under Some Other Ground And Decided Same On The Merits, The Decision Would Of Necessity, Be Against Petitioners On The Issue Raised In Their Petition Herein, Under The Federal Rules Of Civil Procedure.

For the convenience of the Court, Rule 15 (b) reads as follows:

"Rule 15 (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The following annotations of decisions under said rule as shown by Volume 1A Barron and Holtzoff, Federal Practice and Procedure follows:

The case of *Mitchell v. Wright,* C.C.A. 9th, 1946, 154 F.2d 924, holds:

> "An objection in the appellate court which would dispose of a cause upon a technicality in pleading is not to be favored in view of Rules 8 (f) and 15, especially where if the objection had been made below, the plaintiff might have amended his complaint so as to obviate the objection."

The case of *Hart v. Knox County,* D.C. Tenn. 1948, 79 F.Supp. 654, appeal dismissed 171 F.2d 45, holds as follows:

> "Prime purpose of Rule 15 (b) is to avoid necessity of new trials because of procedural irregularities, not to set judgments aside and make new trials necessary."

The case of *U. S. v. Kesinger,* C.A.10th, 1951, 190 F.2d 529, holds as follows:

> "Plaintiff entitled to benefit of defendant's evidence."

The case of *El Paso Elec. Co. v. Surrency,* C.A.N.M, 1948, 169 F.2d 444, holds as follows:

> "Evidence as to negligent operation of defendant's truck, which defendant adduced on direct

examination of its own witness and did not move to strike out, was properly considered in action for injuries sustained in collision with truck, though complaint predicated cause of action on negligence in continuing to operate truck in mechanically dangerous condition without alleging any negligence in operation thereof."

The case of *Globe Liquor Co. v. San Roman,* C.C.A. 7th, 1947, 160 F.2d 800, holds:

"Where at trial evidence is admitted without objection which proves a case different from that alleged in complaint, pleadings may be considered amended to conform to the evidence thus introduced."

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
THREADGILL & HICKS,
TAYLOR B. SMITH,
W. H. JOLLY,

By W. H. JOLLY,
213 North 5th Street,
Columbus, Mississippi,
Attorneys for Respondents.

CERTIFICATE OF SERVICE.

I, W. H. Jolly, attorney for Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the date shown below, I served the foregoing Brief for the Respondents upon W. H. Yates and John W. Gary, Petitioners, by mailing a true copy thereof to Honorable Malcolm B. Montgomery, attorney of record for Petitioners, addressed to him at P. O. Box 1288, Jackson, Mississippi, postage prepaid, first class mail.

WITNESS my signature this 19 day of January, 1967.

W. H. JOLLY,
Attorney for Respondents,
P. O. Box 743,
Columbus, Mississippi.

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT.

SEPTEMBER TERM, 1964.

No. .....

HERBERT H. HODGES AND WIFE, FRANCES A. HODGES,

Complainants,

versus

W. H. YATES, JOHN W. GARY, STATE STOVE MANUFACTURING COMPANY, PLUMBING WHOLESALE COMPANY and ORGILL BROTHERS HARDWARE COMPANY,

Defendants.

BILL FOR ATTACHMENT IN CHANCERY.

TO THE HONORABLE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI:

Come now Herbert H. Hodges and wife, Frances A. Hodges, complainants in the above styled and numbered cause, and file this their Bill For Attachment in Chancery against W. H. Yates, John W. Gary, State Stove Manufacturing Company, Plumbing Wholesale Company and Orgill Brothers Hardware Company, defendants, and in support thereof, would respectfully show unto the Court that:

I.

Complainants, Herbert H. Hodges, and wife, Frances A. Hodges, are adult resident citizens of Web-

ster County, Mississippi. The defendants, W. H. Yates and John W. Gary, are both adult resident citizens of Webster County, Mississippi, and are partners engaged in the general contracting business with their principal place of business located in the City of Eupora, Webster County, Mississippi. The defendant, State Stove Manufacturing Company, is a foreign corporation duly organized, chartered and existing under and by virtue of the laws of the State of Tennessee, and said corporation is domiciled in Ashland City, Tennessee, but said corporation has not qualified to do business in Mississippi, and is not available for personal service of process. The defendant, Orgill Brothers Hardware Company, is a foreign corporation duly organized, chartered and existing under and by virtue of the laws of the State of Delaware, but said company is authorized to do, and is doing, business in the State of Mississippi, and its duly appointed agent for service of process is Sam McElveen of 301-11 West Pearl Street, Jackson, Hinds County, Mississippi. Complainant has been reliably informed and verily believes, and upon such information and belief, charges that the defendants, Plumbing Wholesale Company and Orgill Brothers Hardware Company are in possession of property or funds or both belonging to the defendant, State Stove Manufacturing Company, that is subject to attachment in this cause. The defendant, Plumbing Wholesale Company, is a Mississippi Corporation domiciled in Hinds County, Mississippi, and its duly appointed agent for the service of process is Charles E. Warwick, 825 Bailey Avenue, Jackson, Mississippi.

II.

During the year 1962, the defendants, W. H. Yates, and John W. Gary, partners, constructed a residence or dwelling house for the plaintiffs upon their property in Webster County, Mississippi, located approximately three miles west of Eupora, Mississippi on the north side of, and adjacent to, U. S. Highway 82. It was understood and agreed between the complainants and said defendants that the construction by said defendant contractors of a dwelling for the complainants was to be a "lock and key" job and all work in connection therewith was performed by, or under the direct supervision of, these defendants.

III.

Complainants would further show unto the Court that during the course of the construction by defendants, W. H. Yates and John W. Gary, of their dwelling, said defendants purchased and installed in the residence of complainants a hot water heater that was manufactured by the defendant, State Stove Manufacturing Company. Subsequent to the purchase and installation of said hot water heater manufactured by State Stove Manufacturing Company, said hot water heater exploded and was blown through the roof of complainants' residence, thereby causing the damages hereinafter set forth. The said hot water heater propelled through the roof of complainants' residence and landed in a field approximately 200 feet north of complainants' residence, said explosion having occurred on or about July 26, 1963.

IV.

Complainants charge that said hot water heater installed in their residence was defective and negligently manufactured. The defendant, State Stove Manufacturing Company, was under a duty to use due care to manufacture and sell only such hot water heaters as are safe and in proper operating condition. Complainants charge further that said defendant, State Stove Manufacturing Company, wholly failed to perform said duty in the instant case, and in support thereof would show unto the Court that the bottom of the tank on said hot water heater had been broken and damaged and had been patched and welded before it was installed in the complainants' home. As a proximate result of the negligence and failure to use due care in the manufacture of said hot water heater by the defendant, State Stove Manufacturing Company, the explosion described hereinabove occurred, thereby causing the complainants to sustain the damage set forth herein below.

V.

The complainants say further that the hot water heater installed in their residence was under the exclusive management and control of the defendant, State Stove Manufacturing Company, when it was being manufactured, and that an explosion such as occurred in the instant case does not happen in the ordinary course of events if the manufacturer of said hot water heater uses proper care in the manufacture

thereof. Complainants further say that they were not guilty of any negligence whatsoever in connection with the operation of said hot water heater, and as a result thereof, the defendant, State Stove Manufacturing Company, is liable for the complainants' damages set forth herein under the doctrine of "Res Ipsa Loquitor".

VI.

The complainants have been reliably informed and verily believe, and upon such information and belief, charge that the defendants, Orgill Brothers Hardware Company and Plumbing Wholesale Company are now indebted to the defendant, State Stove Manufacturing Company, and have in their possession and under their control certain funds or property or both belonging to said defendant, State Stove Manufacturing Company. The exact amount of said funds or property or both will be presently remitted by said defendants, Orgill Brothers Hardware Company and Plumbing Wholesale Company, to the defendant, State Stove Manufacturing Company unless prevented by the process of this Court.

VII.

Complainants further charge that the explosion of their hot water heater was caused by the concurring negligence of the defendants, W. H. Yates and John W. Gary, partners, in that they secured a pressure relief valve and carelessly, negligently and improperly

installed said pressure relief valve in the cold water line of the hot water heater instead of the hot water line as they were duly required to do. Complainants would further show that said defendants, W. H. Yates and John W. Gary, held themselves out to the public and to your complainants as being skilled and experienced general contractors capable and qualified to construct a dwelling and to furnish and install any and all appliances desired or needed in connection therewith, including a hot water heater. Complainants further say that said defendants, W. H. Yates and John W. Gary, were required to install the hot water heater of complainants in such a manner so as to not endanger the property, health, lives and safety of complainants, and that said defendants knew, or should have known, that if the pressure relief valve was negligently and carelessly installed in the cold water line of said hot water heater instead of the hot water line as required, an explosion would likely result therefrom, thereby causing property damage or personal injuries or both. Notwithstanding their knowledge of the dangers instant to the negligent and improper installation of said pressure relief valve in said water heater, the defendants, W. H. Yates and John W. Gary, in person or by and through their agents, servants and employees negligently failed to properly install the pressure relief valve in the hot water heater by placing the same in the cold water line of said water heater when complainants' residence was constructed. As a direct and proximate result of said negligent installation of said pressure relief valve, said explosion particularized hereinabove

occurred, thereby causing the complainants to sustain the damages hereinafter set forth.

VIII.

Complainants would further show unto the Court that as a direct and proximate result of the joint and several negligence of the defendants specified hereinabove, and the explosion which ensued therefrom, the complainants' home was destroyed and made totally unfit for any further occupancy. As more particularly shown by the exhibit attached hereto as Exhibit "A" and made a part hereof by this reference thereto, the estimated replacement cost after said explosion was $14,269.96. The salvagable materials totaled $632.00 thereby making the net loss to complainants as a result of the destruction of their house $13,637.96. In addition thereto, complainants would further show that they lost their entire collection of household furniture, fixtures, equipment and clothing. Complainant, Herbert H. Hodges, is a retired psychiatric technician and was previously employed by the State of California. In the period of time that complainant resided in California, he acquired items of rare and expensive furnishings and equipment which cannot be replaced by these complainants, and many other items were destroyed due to the negligence of these defendants that were items of inherent, intrinsic and sentimental value to the complainants far beyond their commercial value. The replacement of these items required not only the expenditure of the sums of money hereinafter specified, but also the expending of

time and effort by complainants in acquiring a completely new set of household furnishings. Complainants would further show that the items which were lost and destroyed as a result of the explosion caused by the negligence of these defendants are set forth in Exhibit "B" to this bill, itemized and evaluated by complainants' best estimate of the fair market value thereof at the time of their loss, and complainants request that Exhibit "B" be incorporated in this bill as a part hereof as if fully copied herein. Exhibit "B", listing the items so lost by these complainants, shows damage to plaintiffs in the amount of $9,4[illegible]00. In addition thereto, complainants lost time and incurred additional expenses as a result of having to find a place to live while their residence was being rebuilt, preparing the inventory of lost property, and replacing the household furniture, fixtures, equipment and clothing destroyed in the explosion. As a result thereof, complainants demand damages for said expense and loss of time in the sum of $2,500.00.

PRAYER.

Wherefore, premises considered, complainants pray that the funds or property or both in the hands of said resident corporation defendants, Orgill Brothers Hardware Company, and Plumbing Wholesale Company, belonging to the defendant, State Stove Manufacturing Company, be attached and that said resident corporation, Orgill Brothers Hardware Company, and Plumbing Wholesale Company, be summoned personally in the manner provided by law in cases of attachment in Chancery; complainants pray further that the defendants, W. H. Yates and John W. Gary, and said

nonresident corporation, State Stove Manufacturing Company, be summoned in the manner provided by law. Complainants pray that all of said defendants be summoned so that they will be required to answer this bill at the next regular term of this Court, to-wit, on the second Monday of September, 1964; but defendants shall not be required to answer under oath, answer under oath being hereby waived. Complainants further pray that upon a final hearing in this cause, complainants be granted a judgment against the defendants, W. H. Yates and John W. Gary, individually, and as partners, and against the defendant, State Stove Manufacturing Company, jointly and severally, in the principal sum of $25,537.96, together with all court costs which may accrue herein. Complainants further pray that the property, funds and effects in the possession and control of the defendants Orgill Brothers Hardware Company and Plumbing Wholesale Company, belonging to the non-resident corporation, State Stove Manufacturing Company, be delivered to this Court or to complainants, and the value of the same be applied to payment of the judgment herein prayed for; and complainants pray for such other and further relief, both general and special, as in equity they may be entitled, as in duty bound they will ever pray.

Respectfully submitted,

HERBERT H. HODGES AND
WIFE, FRANCES A. HODGES,
Complainants.

WILLIAM H. JOLLY AND
THREADGILL & HICKS,

Their Attorneys.

By: .....

STATE OF MISSISSIPPI,
COUNTY OF .....

Personally appeared before me, the undersigned notary public in and for said county and state aforesaid, Herbert H. Hodges, one of the complainants, who, being by me first duly sworn, on his oath, deposes and says that the allegations contained in the foregoing bill for attachment in Chancery are true and correct as therein stated.

.....
HERBERT H. HODGES.

Sworn to and subscribed before me on this the .... day of ....., 1964.

.....
(Seal) Notary Public.

My commission expires: .....

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI.

No. 65,807.

HERBERT H. HODGES AND WIFE, FRANCES A. HODGES,

Complainants,

versus

W. H. YATES, JOHN W. GARY, STATE STOVE MANUFACTURING COMPANY, PLUMBING WHOLESALE COMPANY, AND ORGILL BROTHERS HARDWARE COMPANY,

Defendants.

ANSWER OF STATE STOVE MANUFACTURING COMPANY.

Now comes State Stove Manufacturing Company, one of the defendants herein, by its attorneys, and for answer to the bill of complaint exhibited against it says:

1.

This defendant admits the allegations of residence in paragraph 1. This defendant avers that the attachment defendants, Plumbing Wholesale Company and Orgill Brothers Hardware Company, have now been dismissed from this suit.

2.

This defendant does not answer paragraph 2 of the complaint as no allegations therein pertain to it; however, if complainants intend by paragraph 2 to make any allegations against this defendant, then this defendant does not have any knowledge and has been unable to obtain any information upon reasonable inquiry as to the truthfulness of the allegations of said paragraph 2 and this defendant denies paragraph 2.

3.

This defendant has no knowledge and has been unable to obtain any information on reasonable inquiry as to the truthfulness of the averments of paragraph 3 of the complaint and this defendant denies the allegations of said paragraph, except this defendant admits a hot water heater manufactured by it was placed in complainants' residence.

4.

This defendant denies the allegations of paragraph 4.

5.

This defendant denies the allegations of paragraph 5.

6.

This defendant makes no answer to paragraph 6 of the complaint but avers an order of dismissal has been entered herein whereby Orgill Brothers Hardware Company and Plumbing Wholesale Company have been dismissed as defendants in this cause.

7.

There being no allegations in paragraph 7 of the complaint against this defendant, same is not answered, except this defendant avers it had nothing whatever to do with the installation of the hot water heater and is not guilty of any negligence or wrongdoing which proximately contributed to or caused the occurrence complained of in the complaint.

8.

This defendant denies the allegations of paragraph 8 of the complaint and denies complainants, or either of them, are entitled to judgment against it in any amount.

And for further answer to the complaint and by way of plea thereto, this defendant says:

(a) This defendant was not guilty of any negligence whatsoever in the manufacturing of the heater described in the bill of complaint, but, on the other hand, fulfilled each and every duty owed to complainants. This defendant had nothing whatsoever to

do with the installation of the hot water heater in complainants' residence or with the attachment of valves thereto, it being necessary that the installer or owner of said hot water heater attach certain valves thereto. This defendant had no knowledge whatever concerning the purchasing and installation of said hot water heater in complainants' residence. There was attached to the heater at the time it left the possession of this defendant certain instructions for installation and operation of the heater. This defendant avers the instructions for the installation and operation of the heater and the attachment of certain parts thereto, which were not furnished by this defendant, were not followed and said heater was not properly installed. That such improper installation was the sole proximate cause of the occurrence complained of in the bill of complaint and this defendant is not responsible therefor.

(b) This defendant further avers that on the date of the occurrence complained of a severe lightning storm took place and struck complainants' residence or wires leading thereto and was the sole proximate cause of the occurrence complained of for which this defendant is not responsible.

(c) That the hot water tank and the installation thereof was open and obvious to complainants and said tank had been in complainants' exclusive possession for a long period of time. That if this defendant was in any way negligent in the manufacturing of said heater, which is denied, the condition thereof was

open and obvious to complainants and they assumed the risk of an occurrence taking place by continuing to use said heater.

And now having fully answered, this defendant prays that it be dismissed with its costs.

STATE STOVE MANUFACTURING COMPANY,
Defendant,
By BUTLER, SNOW, O'MARA, STEVENS & CANNADA,
By .....
Its Attorneys.

MISSISSIPPI CHANCERY PRACTICE—GRIFFITH.

Section 186. The general prayer.—In addition to the special prayer the complainant should never omit to include a prayer for general relief, for under a prayer for general relief the court will extend to the complainant such redress as will be agreeable to the case made out by the bill whether or not specially mentioned or prayed in the bill, and especially so if it will not cause surprise or prejudice to the defendant. Under the prayer for general relief the complainant may have any other relief than that specifically prayed if it be within the scope of the facts of the bill, and not inconsistent with the purpose of the bill, and which cannot be said to surprise the defendant. It was formerly the rule that no relief could be granted under the general prayer which was inconsistent with that specifically prayed. In our modern practice the rule is more liberal, and under the general prayer any

relief consistent with the bill and within its scope may be afforded, though it be inconsistent with the specific relief prayed. But the relief must yet be such as can be afforded on the facts stated, and it must appear that the defendant is fairly appraised by the bill that the relief is sought by the complainant. As a further evidence of a growing liberality towards the true ends of justice, as distinguished from the consecration of technicality formerly so often witnessed, it was held in one of our cases that when all the facts are stated it is immaterial that the complainant may have called them by the wrong name, the court saying further in that case: "And to the objection that no other relief can be granted than that specifically prayed, or of the same character, because the prayer for general relief is in the conjunctive instead of the disjunctive, we have only to say that the day has long passed, in which such objections can be regarded in courts administering justice."

Supreme Court of the United States

OCTOBER TERM, 1966

Office-Supreme Court, U.S.
FILED
JAN 26 1967
JOHN F. DAVIS, CLERK

No. 898

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents.

PETITIONERS REPLY TO RESPONDENTS BRIEF.

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM,
By MALCOLM B. MONTGOMERY,
315-21 Barnett Building,
Jackson, Mississippi.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 898.

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES, and FRANCES A. HODGES,
Respondents,

PETITIONERS REPLY TO RESPONDENTS BRIEF.

ADMISSIONS BY RESPONDENTS.

In their brief, Respondents admit the following:— (1) By offering no argument to the contrary, they admit that under Mississippi jurisprudence, the judgment rendered by the Supreme Court of Mississippi is a final judgment; (2) They admit that the Complainants Bill of Complaint charged only one single duty on the part of Petitioners and that duty was to install a pressure relief valve (the type installed) on the hot water side of the heater and that Petitioner Defendants violated that duty by installing this pres-

sure relief valve on the cold water side of the heater and that such was the proximate cause of the explosion; (3) They admit that the Bill of Complaint did not charge that it was the duty of Petitioners to install a different type valve, known in the trade as a combination pressure relief and temperature valve on the hot water side and the bill did not charge that the failure to do so was the proximate cause of the explosion; (4) They admit that the Supreme Court of Mississippi rendered a final judgment against Petitioners solely on the ground that they were negligent in failing to install the combination pressure relief and temperature relief valve on the hot water side of the heater, even though such negligence was not charged in the Bill of Complaint, no issue was tendered thereon in the bill, Petitioners were denied their day in Court to defend against such uncharged cause of action and any evidence they might offer to disprove the charge would be incompetent, because not relevant to any issue framed by the pleadings between the Complainant Respondents and the Defendant Petitioners, and all this without the consent of Petitioners, and in direct conflict with this Court's holding in *Coe vs. Armour Fertilizer Works, 237 U. S. 413; Reynolds vs. Stockton, 140 U. S. 254; Putnam vs. Day, 89 U. S., (22 Wall) 60, 66,* and *Saunders vs. Shaw, 244 U. S. 371;* and (5) They admit, by not arguing to the contrary, that such conduct on the part of the Supreme Court of Mississippi is in conflict with the Fourteenth Amendment of the Federal Constitution and constitutes a denial of due process as held in *Saunders vs. Shaw, (La. 1917) 244 U. S. 371, 37 S. Ct.*

638, 61 L. Ed. 1163, and (6) Admits by not arguing to the contrary that the federal question of due process was timely raised.

ANSWERING RESPONDENTS POINT ONE.

Respondents argue (Page 2 of Brief) that although Respondents did not sue on a cause of action against Petitioners, based upon the violation by Petitioners of a duty to install a combination pressure and temperature relief valve on the hot water side of the heater, yet the Supreme Court of Mississippi, was within its power and jurisdiction to render a judgment on this unpleaded cause of action, because proof had been offered by Petitioners co-defendant, State Stove Manufacturing Company, in support of an affirmative defense in its answer, over the continuing objection by Petitioners that the evidence was not competent as against Petitioners because it was not relevant to any issue raised by the Respondents Bill of Complaint and the Answer of these Petitioners.

This argument of Respondents is so contrary to Mississippi jurisprudence as to be laughable and bears no resemblance to any rule of law recognized in this State.

The Supreme Court of Mississippi, has clearly established the law of this State to be that it is the pleadings between the Complainant and each separate Defendant that establish the issues between them respectively, and that the Courts are obliged to

follow and to hold the proof offered between these parties to the specific issues raised between them by their pleadings. *Mississippi Power & Light Co. vs. Petts, 179 So. 364, 365.* In *Wilson vs. Terry, 67 So. 2d 387,* the Supreme Court of Mississippi, held that a Defendant is required to take notice and defend only against the allegations against him, if any, in the original or amended bill or declaration. In *Rutland et al. vs. McIntosh, 83 So. 635,* the Supreme Court of Mississippi held that relief cannot be granted to a Complainant under a prayer for general relief unless such relief is supported by a specific allegation of fact alleged in the bill entitling him to that relief.

It is the fundamental law of Mississippi, that the relief to be decreed must conform to and come within both the pleadings and the proof, including as proof those things which are judicially admitted *(R. R. Co. vs. Carter, 107 Miss. 1, 64 So. 842)* and no valid decree can go outside of the boundary prescribed by the pleadings and proof. *Nixon vs. Biloxi, 76 Miss. 812, 25 So. 654; Barker vs. Jackson, 90 Miss. 628, 44 So. 34; Hart vs. Chemical Bank (Miss.) 27 So. 926; Phelps vs. Commodore (Miss.) 1 So. 834; Blythe vs. Simmons, 107 Miss. 510, 65 So. 571; Baygents vs. Beard, 41 Miss. 534; Cox vs. Kyle, 75 Miss. 669, 23 So. 518.* It is also fundamental that relief cannot be awarded on an issue not submitted by the bill itself. *Blythe vs. Simmons, 107 Miss. 510, 65 So. 571; Tierney vs. Klein, 67 Miss. 179, 6 So. 739, 8 So. 424,* and *Parks vs. Kline, 118 Miss. 125, 79 So. 81.* No defects in the Bill of Complaint can be supplied by any adversary's

pleading. (See opinion of *McLean J.*, in *Jackson vs. Ashton, 11 Pet. (U. S.) 229; Story Eq. Pl. Sec. 257.*

The holdings of the Supreme Court of the United States are in accord with the above cited Mississippi cases. *Reynolds vs. Stockton, 140 U. S., P. 266.*

In *Putman vs. Day, 89 U. S. (22 Wall) 60, 66,* this Court held that a decree is void unless it is founded on the allegata as well as the probata of the case.

In *United States vs. Goldstein, et al., 271 Fed. 838 (10th Cir.)* it was held that a judgment upon a matter not within the pleadings is void, being contrary to fundamental principles of justice.

In *Saunders vs. Shaw, (1917) 244 U. S. 371;* this Court held that where, as here in the case at bar, a case has been decided by a State Supreme Court in such a way that a party has not had a proper day in Court to present his defense, he has been denied the due process guaranteed him by the Fourteenth Amendment. But despite these decisions by this Court to the contrary, the Respondents in their concluding paragraph to their Point One are so bold as to deny that the judgment sought herein to be reviewed denies due process regardless of the uniform holdings of the State and Federal cases holding directly to the contrary.

In Mississippi the right of recovery is limited to the negligence charged in the declaration. *Eagle Cotton Oil Co. vs. Pickett, 175 Miss. 577, 166 So. 764.*

In *N. O. & N. E. R. Co. vs. Mikes, 197 Miss. 846, 20 So. 2d 657,* it was held that when negligence is the cause of action the verdict must be confined to the ground or grounds of negligence alleged as the cause of action.

In *Hines vs. McCullers, 212 Miss. 666, 676, 83 So. 734,* the Court declared this rule to be elementary.

In *Dowd vs. Morgan, 23 Miss. 587,* it was held that Courts of justice cannot grant relief or give judgments except upon the ground such relief is sought.

We respectfully submit that according to its previous decisions above cited the Supreme Court of Mississippi exceeded its jurisdiction and awarded a void judgment against Petitioners upon an assumed cause of action, that was not sued on in the Bill of Complaint, and of which Petitioners were not informed, were not summoned to defend, did not litigate and that said decree is void. It falls within the condemnation of the above cited decisions of this Court and the Mississippi decisions.

POINT TWO.

Under this Point Respondents argue that under Rule 15 of the Federal Rules of Civil Procedure the decision must be against Petitioners.

This argument has no foundation in law and is wholly unsupported by the record, because:

1. Rule 15 has no application to a trial in a State Court but applies only to procedure in Federal Courts.

2. This suit was tried in a State Court and comes here on petition for certiorari to the Supreme Court of Mississippi.

But even if Rule 15 did apply this case would not come within it because:—

1. When testimony was offered by State Stove Manufacturing Company in support of its affirmative defense, the Petitioners did object to the competency of same as against Petitioners, Yates and Gary, on the ground that it was not charged in the Bill of Complaint, that there was no issue thereon between Complainants and Petitioners, Yates and Gary, and no testimony is competent unless relevant to an issue in the case. (R360-363) In such cases Rule 15 would not apply even if the trial had been in a Federal Court.

In addition when the objection was made the Complainants made no motion to amend and after the testimony was all in the Complainants still made no motion to amend to conform to the proof.

Respondents say (Page 3 of Brief) that it was impossible for Respondents to allege it in their Bill of Complaint for the reason that this information was solely known to Petitioners and their Agent. The facts are, however, that it was affirmatively charged as a defense in State Stove Manufacturing Company's an-

swer that was filed in the cause long prior to the trial and the facts of such defense were well known to Respondents. Complainants should have amended their Bill of Complaint when this information was disclosed in the State Stove Company's answer, but they chose not to do so and by choice retained as the sole cause of action the charge that Petitioners were negligent only because they installed the value on the cold water side of the heater instead of on the hot water side. They knowingly chose the cause of action sued on and are bound to their pleading and their relief was limited to that disproved cause of action.

THE FEDERAL QUESTION WAS TIMELY RAISED.

Where, as here, a State Court has rendered a judgment upon a cause of action not sued on and this was the first time the question was raised and the Petitioners promptly filed a Suggestion of Error containing the ground that Petitioners had been deprived of due process of law, contrary to the 14th Amendment, the Federal question is substantial and was timely raised. *Saunders vs. Shaw, 244 U. S. 317.*

According to our understanding, it is the function of this Court to resolve conflicts of opinion on federal questions that have arisen between the highest court of a state and the decisions of this Court. Such being the case, the Supreme Court of the United States, to remain effective, must continue to grant certiorari in all cases such as here, where the opinion of the Supreme Court of Mississippi holds that its judgment is

not a denial of due process of law, in violation of the 14th Amendment. For it to render a judgment on cause of action not sued on, while the decisions of this Court are to the contrary and hold that such is a denial of due process in violation of the Fourteenth Amendment created a conflict between the decision of the Supreme Court of Mississippi and the decisions of this Court on a question involving the construction of the due process clause of the Federal Constitution, that must be resolved and corrected by this Court.

IMPORTANCE OF THIS PETITION.

By this petition we are representing not only the Petitioners, our clients, but we are also representing the tremendously important principles, upon which are based the plans, hopes, and aspirations of all people throughout this entire Nation.

These Petitioners, though only a small contracting firm in a small town, and being only two persons among the vast total population of this Nation, still the same guaranty of due process of law here involved in their behalf applies to them that same protection guaranteed to and shared equally with every other two persons in the Nation. To deny this protection to Petitioners would be a denial to all. A denial to all would constitute a repeal of the due process clause of the Fourteenth Amendment.

The property rights of these two people are not essential to the economic welfare of the Nation, but the

Constitutional rights of two people are the Constitutional rights of every living citizen of this Nation. With such vast and comprehensive rights involved in this case, we are sure that this Court will determine that this Court will never yield to any request to deny the Constitutional rights of due process to all or even to one of the people of this Nation. Such, we deem to the importance of this case.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BARNETT, MONTGOMERY,
McCLINTOCK & CUNNINGHAM,

Malcolm B. Montgomery

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CERTIFICATE OF SERVICE.

I, Malcolm B. Montgomery, Attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the date shown below, I served the foregoing Petitioners Reply to Respondents Brief on Herbert H. Hodges and Frances A. Hodges, his wife, Respondents, by mailing a true copy thereof to Honorable W. H. Jolly, P. O. Box 743, Columbus, Mississippi, and to Honorable DeWitt T. Hicks, Jr., Threadgill and Hicks, P. O. Box 1094, Columbus, Mississippi, air mail, postage prepaid, by first class mail, Attorneys of record for said Respondents.

Dated this, the 25 day of January, 1967.

Malcolm B. Montgomery

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MALCOLM B. MONTGOMERY.